Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JUDITH CLARK ET AL.,

Petitioners,

v.

CARLA STOVALL, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the Tenth Circuit United States Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Stephen W. Cavanaugh
Counsel of Record
Harold A. Houck
Fisher, Cavanaugh, Smith & Lemon, P.A.
2942A S.W. Wanamaker Drive, Suite 100
Topeka, Kansas 66614
(785) 440-4000

Attorneys for Petitioners

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QUESTION PRESENTED

On the same set of facts, currently pending before the Court are Petitions for Writs of Certiorari to the First and Second Circuits. *See Greenless v. Almond*, 277 F.3d 601 (1st Cir.), *petition for cert filed*, (U.S . April 29, 2002) (No. 01-1635)); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir.), *petition for cert. filed*, (U.S. April 19, 2002) (No. 01-1558). These cases relate to the same question.

Does a court purporting to apply the "plain meaning" rule of statutory construction properly give effect to the will of Congress when its construction:

(a) assumes "clear and unambiguous" language where other courts have discerned ambiguity;

(b) partially repeals a statute by implication—thus destroying the valuable vested statutory rights of millions of Americans—where there is no reference in the text or legislative history of the latter enactment to the statute purportedly repealed, the rights embodied therein, or its former beneficiaries;

(c) rejects a plain interpretation that gives effect to both the earlier and later statutes, thus ignoring the cardinal obligation to harmonize statutes whenever possible;

(d) ignores the statutory context that confirms a more plausible legislative intent;

(e) renders all but the last sentence of the latter enactment superfluous;

(f) finds an implied repeal in an emergency appropriations rider—even though both houses of Congress forbid such substantive change of law in appropriations measures; and

(g) effects a massive taking of property without just compensation, though Congress never contemplated such a result, which raises serious constitutional problems that can easily be avoided with a harmonizing interpretation?

PARTIES TO PROCEEDING

The parties to the proceedings below were the petitioners Judith Clark et al., on behalf of themselves and all others similarly situated, and the following respondents:

1. Defendant Carla Stovall, in her official capacity as Attorney General of the State of Kansas.
2. Defendant Janet Schalansky, in her official capacity as Secretary of Kansas Department of Social and Rehabilitation Services.
3. Defendant Citibank NA, in its capacity as the escrow agent on behalf of the State of Kansas.

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OPINIONS BELOW

The decision of the United States District Court for the District of Kansas, reported at 158 F.S.2d. 1215 (D. Kan. 2001) and the unpublished opinion of the Tenth Circuit United States Court of Appeals, reported at 2002 WL 798259 (10th Cir.(Kan.)) are set forth in the Appendix at App. 1a and App. 7a, respectively.

BASIS FOR JURISDICTION

The opinion of the Tenth Circuit United States Court of Appeals was filed on April 30, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the United States Constitution Amendments V and XIV appear in the Appendix at App. 27a. In addition, the relevant portions of the Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57 (1999) (codified at 42 U.S.C. § 1396b(d)(3)) and of 42 U.S.C. § 1396k appear at App. 31a and 28a, respectively.

STATEMENT OF THE CASE

This case derives from the lawsuits by the fifty states against tobacco companies to recoup the states' Medicaid expenditures. These historic lawsuits ultimately led to an unprecedented settlement in which states stand to collect billions of dollars in perpetuity.

Federal Medicaid law provides that upon actual collection of any Medicaid recovery—for example, upon each future annual payment from tobacco companies—the state and federal governments are fully made whole for their Medicaid expenditures. The balance of the recovery, if any, goes to

individual Medicaid recipients such as Petitioner here. 42 U.S.C. § 1396k(b).

This lawsuit is that simple. Yet is has spawned a bizarre jurisprudence. In the several states where Medicaid recipients have sued to enforce supreme federal Medicaid law (including Kansas, the origin of this lawsuit), nearly all courts have decided that Medicaid recipients lose, but their multiple paths to that result often contradict each other and this Court's authoritative direction. While district courts have nearly all dismissed these Medicaid enforcement cases on Eleventh Amendment sovereign immunity grounds, only one of the eight federal courts of appeal to decide a Medicaid case has agreed. Two circuits expressly disagreed, holding correctly that the Eleventh Amendment did not bar this suit for prospective enforcement of supreme federal law. Five other circuits elected to bypass the Eleventh Amendment question and affirmed on different grounds.

Five federal courts of appeal—the First, Second, Fourth, Sixth and Tenth Circuits—decided the case based upon an emergency appropriations rider enacted in 1999, in which Congress waived the federal share of the states' historic Medicaid recovery. *See* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57, 103-04 (1999), codified at 42 U.S.C. § 1396b(d)(3) (App. at 33a). These courts inflated that express waiver of the *federal* share into an implied repeal of *Medicaid recipients'* statutory entitlement to the remainder under 42 U.S.C. § 1396k(b).

This Petition seeks review of this remarkable departure from established canons of statutory construction.

A. The Medicaid Program

"The Medicaid program provides federal funds to States that pay for medical treatment for the poor." *Schweiker v. Gray*

Panthers, 453 U.S. 34, 36 (1981). It is "a cooperative federal-state program through which the Federal Government provides financial assistance to the states so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 502 (1990).

"Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae*, 448 U.S. 297, 301 (1980); *see also Wilder*, 496 U.S. at 501. Kansas has chosen to participate in the Medicaid program, and by statute commits to administration of its Medicaid program "to comply with the conditions provided for obtaining federal grants ... as set forth in federal laws and federal rules and regulations." K.S.A. 39-701; K.S.A. 39-708c.

Among the provisions of the Medicaid Act, to which Kansas expressly subscribed in exchange for hundreds of millions of dollars of federal assistance, is mandatory recovery, where practicable, of Medicaid expenditures for which third parties are responsible. 42 U.S.C. § 1396a(a)(25). Such a recovery must then be distributed in the following order: (1) to the state, for its Medicaid expenditures; (2) to the federal government, for its contributed expenditures; and (3) to the injured Medicaid recipients on whose behalf the expenditures were made. 42 U.S.C. § 1396k(b) (App. at 46a); *see also* 42 C.F.R. § 433.154 (same); 45 Fed. Reg. 8983 (1980) (HCFA's official commentary). This distribution requirement ensures that both the state and federal government are made whole, with the balance of a recovery, if any, going to the injured party.

B. Kansas's Medicaid Recovery: The Tobacco Settlement

This case arises following Kansas's resolution of its lawsuit against manufacturers of tobacco products, brought in August 1996 by the State of Kansas against the tobacco industry. Prominent in Kansas's lawsuit, as with the tobacco lawsuits of all states, were claims of Medicaid expenditures caused by tobacco products.

The case settled on December 3, 1998 pursuant to a Consent Decree and Final Judgment. Kansas then became eligible to participate in a Master Settlement Agreement ("MSA") crafted by the tobacco industry and the Attorneys General of 46 settling states. In the MSA, the states agreed to "unconditionally release and forever discharge" the tobacco defendants from "any future claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products." MSA at 8, 55. In exchange for this release, the states, including Kansas, became eligible to collect from the tobacco defendants future anticipated annual payments in a total amount then estimated at $206 billion. The complaint in this case pleads, and the evidence submitted to the district court confirms, that Kansas's settlement collections will substantially exceed its actual smoking-related Medicaid expenditures, and that Petitioners and others similarly situated are entitled to those excess collections under governing federal law.

Significantly, before these Medicaid enforcement lawsuits, there was no material controversy over the straightforward proposition that the tobacco settlement constituted a Medicaid recovery. Indeed, until the pot got massive, states themselves behaved in conformity to § 1396k(b)'s mandatory distribution scheme. In testimony before Congress, the Deputy Administrator of the Health Care

Financing Administration ("HCFA," the federal agency then responsible for administering the Medicaid program), stated:

> Existing Federal law clearly requires States to share all Medicaid recoveries with Federal taxpayers. **Nothing in the law creates an exception for tobacco settlements, regardless of their size.** States routinely report and credit HCFA with the Federal share of third party liability collections. It is worth highlighting that three States—Massachusetts, Louisiana, and Florida—reported and credited to HCFA some of their tobacco collections as part of a settlement with the Liggett Corporation. Although the funds involved in the Liggett settlement are much smaller than those at stake in the comprehensive settlement, these initial payments indicate that **the States understand their legal and fiduciary responsibility to credit the Federal government with its share of tobacco settlement proceeds.**

Medicaid and Tobacco Settlements, 1999: Before Subcommittee on Labor, HHS, Education, and Related Agencies of the Senate Comm. on Appropriations, March 15, 1999, (Statement of Mike Hash, Deputy Administrator, Health Care Financing Administration) (emphasis added).

C. This Lawsuit for Prospective Enforcement of 42 U.S.C. § 1396k(b).

Petitioners Judith Clark et al. filed suit on behalf of themselves and all others similarly situated in the United States District Court for the District of Kansas on April 12, 2000. Defendants Stovall, Schalansky, and Citibank NA filed a motion to dismiss under Rule 12(b)(1) on June 22, 2000, claiming that Eleventh Amendment sovereign immunity barred Petitioner's claims. The trial court agreed

and granted the motion to dismiss by order dated March 2, 2001.

On April 30, 2002, the Tenth Circuit affirmed on other grounds, *Clark v. Stovall*, 2002 WL 798259 (10th Cir). This ruling was based on *Harris v. Owen*, 264 F.3d 1282 (10th Cir. September 10, 2001).

The Tenth Circuit panel, however, held that the Eleventh Amendment did not bar the claims. The panel instead decided that Congress' 1999 emergency appropriations rider (App. at 4a)—an amendment to a separate section of the Medicaid Act concerning only calculation of money due the federal government—implicitly repealed § 1396k(b) and thus *sub silentio* stripped Medicaid recipients of substantial vested rights. Neither the text of the 1999 appropriations rider nor its legislative history makes any reference to § 1396k(b) or to the rights of Medicaid recipients embodied therein.

REASONS FOR GRANTING THE WRIT

This case frames a pure issue of statutory construction with implications for how every judge in every district and appellate court interprets legislation. Petitioner respectfully contends that the error in the Second, Tenth, and First Circuits bespeaks a fundamental misunderstanding of the weight and interrelation of core canons of statutory construction.

The Tenth Circuit concluded that the final sentence of Congress' 1999 appropriations rider—permitting the states to "use the sums described in clause (i) for any expenditures determined appropriate by the State"—means that the states could spend the *entire* tobacco settlement in any manner they pleased, and that Congress thus not only gifted billions of *federal* dollars to the states but likewise by stealth stripped Medicaid recipients of their vested statutory rights.

Yet the text of the appropriations rider does not say that. Nor could its *context* cue any conclusion other than the opposite one. And the rider's legislative history confirms the error. The members of Congress debated only what to do with the *federal* share of the states' Medicaid recovery. The members of Congress then located their enactment in a section of the Medicaid Act addressing only money to which the *federal government* would have been entitled. And they did so with an emergency appropriations rider—the kind of enactment *least* suited to affect substantive change in law (which is why rules in both houses of Congress forbid it). Never once did any member of Congress ever mention or even imply any intention to affect Medicaid recipients' rights.

At stake here is not only a massive confiscation of property from the nation's poorest citizens,[1] or merely a mistaken interpretation of a single statute—but the basis upon which the judiciary lays claim to principled and consistent decision-making. The danger in the circuit decisions is an unprecedented departure from the rules that discipline judges in "giving effect to the will of the Legislature." *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738, 866 (1824). The published opinions to date—and more Medicaid enforcement cases are currently under consideration—imperil the utility and integrity of the canons of construction. On this record, the core canons of statutory construction have little power to cabin judicial discretion.

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[1] Medicaid, as "the payor of last resort," requires citizens to spend down their assets to meet eligibility levels. *See* 42 U.S.C. 1396a(a); S.Rep. No. 99-146 at 312, reprinted in 1986 U.S.Code Cong. & Ad.News, vol. 3A, 279 ("Medicaid is intended to be the payor of last resort, that is, other available resources must be used before Medicaid pays.").

Indeed, to the eight well-settled canons of statutory construction set forth in the following Supreme Court cases, the Tenth Circuit decision below, as well as the decisions from the First and Second Circuits, essentially add, "**or not**."

- "[W]here two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotations omitted). The two statutory provisions at issue are clearly capable of co-existence—in § 1396k(b), Congress mandated a specific distribution scheme for Medicaid recoveries; in the 1999 appropriations rider, Congress declared that the states were free to use *the federal share* of the tobacco settlement however they wish.

- **"[T]he meaning of statutory language, plain or not, depends on context."** *Bailey v. United States*, 516 U.S. 137, 145 (1995). The statutory context of the 1999 amendment confirms Congress' intent only to waive the federal share of the tobacco settlement, not to affect Medicaid recipients' rights.

- **"[I]t can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change."** *United States v. Fausto*, 484 U.S. 439, 453 (1988). Neither the text nor legislative history of the 1999 appropriations rider even hints at any intention to affect § 1396k(b) or the rights of Medicaid recipients.

- **"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest."** *Rodriguez v. United States*, 480 U.S. 522, 524 (1987); *see also Radzanower v. Touche Ross & Co.*,

426 U.S. 148, 155 (1976) (implied repeals would require "positive repugnancy between the provisions"); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."). Congress did not even hint at intent to repeal § 1396k(b), much less make it clear and manifest or enact a "positive repugnancy."

- **"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"** *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders superfluous all of the 1999 amendment except the final sentence.

- **The doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act."** *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). The 1999 amendment was an emergency appropriations rider—a legislative vehicle that, by rules in both houses of Congress, cannot affect substantive change in law.

- **"Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively."** *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The circuit court's interpretation operates retroactively to

strip Medicaid recipients of substantial vested rights, though Congress never hinted at any intention to affect Medicaid recipients *at all*, much less directed such a confiscation with "the requisite clarity."

- **Statutes must be interpreted to avoid not merely unconstitutional results, but "difficult constitutional questions," and where, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems."** *St. Cyr*, 533 U.S. at 300 & n.13. According to the circuit court's interpretation, Congress retroactively confiscated Medicaid recipients' statutorily vested property interest in the tobacco settlement remainder—which assuredly raises a "difficult constitutional question," despite a logical and persuasive interpretation that avoids constitutional difficulty.

The "plain meaning" doctrine is a powerful force that disciplines judiciary and legislature alike—but like all rules of statutory construction, its power must be exercised responsibly and always in the service of discerning actual legislative intent. This Court's recent unanimous disposition in *Department of Housing and Urban Development v. Rucker*, ___U.S.___; 122 S.Ct. 916 (March 26, 2002)—reversing the en banc Ninth Circuit—is illustrative. The en banc Ninth Circuit contrived an inventory of improper canons to subvert plain statutory meaning and clear congressional intent. Here, the Tenth Circuit ignored numerous well-settled canons of construction to find plain meaning where there is none, and to subvert clear congressional intent. There is manifest error in either approach.

This case provides an ideal complement to the principles forcefully enunciated in *Rucker*. Where *Rucker* illustrates

the proper use of the plain meaning doctrine, this case illustrates its misuse.

If, as Petitioner respectfully contends, the Tenth, Second, and First Circuits erred, then the very magnitude of that error, in a case affecting millions of Americans immediately, and countless more in future judicial dispositions, warrants this Court's intervention to correct it. If, as Respondents will contend, the circuit decisions are correct in result, then this Court's explanation of a principled basis for that result can have enormous consequences for how judges and litigants comprehend the tools of statutory construction.

ARGUMENT

I. The Current Medicaid Enforcement Landscape

Numerous district courts and eight federal courts of appeal, including the Tenth Circuit, have decided similar cases on a variety of often contradictory grounds. Decisions to date are nearly all adverse to Medicaid recipients—yet that "momentum" is so fragmented and so fraught with conflict and disagreement that the ease with which most courts have apparently decided the result very much belies the struggle to find a principled basis for that result.

The first—and perhaps most influential—Medicaid enforcement disposition in federal court was *Floyd v. Thompson*, 111 F.Supp.2d 1097 (W.D. Wis. 1999), *aff'd on other grounds*, 227 F.3d 1027 (7th Cir. 2000). The court dismissed the case by declaring that the tobacco settlement proceeds were "fixed" and had already "vested" in the state, rendering the case one for retrospective "damages" and thus barred by the Eleventh Amendment—a conclusion both factually wrong and legally irrelevant to the proper *Ex parte Young* analysis.

While eight United States Courts of Appeals have now issued decisions on versions of these Medicaid enforcement actions, only the Sixth Circuit has embraced the Wisconsin court's conclusion, yet the Tenth Circuit expressly repudiated it. Indeed, only one single federal appellate court has yet held that the Eleventh Amendment bars a Medicaid enforcement action—and two (the Fifth and Tenth Circuits) have correctly held that it does not. But the Wisconsin court's analytical virus spread rapidly through other district courts, and at least **eleven** such courts reproduced the Wisconsin court's fallacious reasoning in dismissing these cases on Eleventh Amendment grounds.[2]

The first federal appellate court to decide a Medicaid case was the Seventh Circuit in *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000). Concluding that the Eleventh Amendment questions were "complex" and "not easily answered," *id.* at 1034-35, the Seventh Circuit skipped them and proceeded to the merits. As to Congress' 1999 appropriations rider—now the most common basis for adverse decisions in appellate courts and the basis for this Petition—the Seventh Circuit simply discerned ambiguity: maybe Congress agreed with the states or maybe Congress was just "feeling generous." *Id.* at 1034.

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[2] *See Barton v. Summers*, 111 F.Supp.2d 989, 992 (M.D.Tenn. 2000); *White v. Hunt*, 2000 WL 33261006, *5, No. 00-CV-14 (W.D.N.C. Jul. 12, 2000); *McClendon v. Georgia Dep't of Community Health*, No. 4:00-CV-0026-HLM, slip op. at 17 (N.D.Ga. Aug. 28, 2000); *Downs v. Kentucky*, No. 00-23, slip op. at 7 (E.D.Ky. Aug. 31, 2000); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D.N.M. 2000); *Strawser v. Lawton*, 126 F.Supp.2d 994, 1003 n.6 (S.D.W.Va. 2001); *Cardenas v. Anzai*, 128 F.Supp.2d 704, 709 (D.Haw. 2001); *Greenless v. Almond*, No. 00-037ML, slip op. at 6 (D.R.I. Feb. 26, 2001); *Rickerts v. Guinn*, No. CV-N-00-0176-HDM, slip op. at 4 (D.Nev. Feb. 27, 2001); *Clark v. Stovall*, 158 F.Supp.2d 1215, 1224 (D.Kan. 2001); *Joseph v. Condon*, No. 6:00-324-24, slip op. at 11 (D.S.C. Mar. 19, 2001).

Thus, the Seventh Circuit acknowledged ambiguity in precisely the words that the Tenth Circuit below deemed "plain" and "plain English," Harris, 264 F.3d at 1295-1296.—which is to say that the very word "unambiguous" now assumes an ironic ambiguity. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) (questioning characterization of a statutory term as unambiguous when its meaning has generated a division of opinion in the lower courts).

On narrow grounds of Wisconsin assignment law, the Seventh Circuit held that § 1396k(b) did not come into play because there was not (and, logically extending this holding, never could or ever will be under any circumstances) a "remainder" to which Medicaid recipients could be entitled. If, as the Seventh Circuit found, the "assignment [to the state by Medicaid recipients] corresponds exactly to the amounts the state pays," *id.* at 1037, then 42 U.S.C. § 1396k(b) is a nullity, never triggered, and so much statutory surplusage—because any conceivable remainder has been defined out of existence by the artifice of declaring that the state collects "under an assignment" exactly what it spends.

The Fifth Circuit then decided *Watson v. State of Texas*, 261 F.3d 436 (5th Cir. 2001), a Medicaid enforcement action with a somewhat different procedural posture. Confronting the Eleventh Amendment head on—but not addressing *Ex parte Young*—the Fifth Circuit concluded simply that the State of Texas had waived its sovereign immunity in the Master Settlement Agreement as to matters of enforcing that Agreement, and that the instant case was such a case of enforcement.

As to Congress' 1999 appropriations rider, the Fifth Circuit held exactly as the entire text, its context and legislative history compel: "The Federal Government has waived any claim it may have to reimbursements." *Id.* at 443 (citing 42

U.S.C. § 1396b(d)(3)(B)(i)). Nothing more, nothing less. The Second and Tenth Circuit's "clear and unambiguous" *opposite* meaning had yet to become plain.

The Fifth Circuit then proceeded to its version of the merits, and concluded that Texas proceeded "directly" against tobacco companies, rather than through subrogation or assignment, and that the absence of state claims "under an assignment" accordingly failed to trigger § 1396k(b). *Id.* at 444. Thus, while the Seventh Circuit's disposition essentially reads § 1396k(b) out of the statute books, the Fifth Circuit's disposition permits a state to accomplish that remarkable result at its pleading discretion (*viz.*, by proceeding "directly" against a third-party tortfeasor, rather than "under an assignment").

Ten days after the Fifth Circuit's disposition, the Eleventh Circuit decided *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252 (11th Cir. 2001). Doubling back to the Seventh Circuit's approach, and likewise finding the *Ex parte Young* issues "much thornier," *id.* at 1259, the Eleventh Circuit skipped to the merits, and concluded that Georgia only collected under the statutory assignment "what it actually spent on medical assistance." *Id.* at 1261. Again, the deceptively elegant appearance of this disposition (assignment equals collection) belies what is in fact a complete evisceration of § 1396k(b)—or that portion of it that benefits Medicaid recipients. In the Seventh and Eleventh Circuits, the phrase, "and the remainder of such amount collected shall be paid to such individual," has disappeared from the United States Code, there no longer being any possibility of such a "remainder."

The Tenth Circuit weighed in next with yet a fourth approach to the issues. In *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), the court first concluded that it was obliged to resolve the Eleventh Amendment issue. "Once effectively

raised, the Eleventh Amendment becomes a limitation on our subject-matter jurisdiction, and we may not then assume 'hypothetical jurisdiction' to reject a plaintiff's claim on the merits." *Id.* at 1288.

Thereupon, the Tenth Circuit finally addressed and authoritatively dispatched the mischief wrought by the Wisconsin district court in *Floyd*. "From a purely economic perspective, it may be irrelevant that the settlement funds are to be paid over time rather than all at once; the future amount can be reduced to present value. For the purposes of the Eleventh Amendment, however, the difference is highly relevant." *Id.* at 1291-92. Concluding that the state's decision to keep the entire tobacco windfall "may constitute an ongoing violation of federal law," and that the plaintiff sought only "prospective" relief with respect to future collections, the Tenth Circuit concluded that *Ex parte Young* operated to avoid the Eleventh Amendment bar. The court only then turned to the merits. For multiple reasons discussed hereunder, the Tenth Circuit erred in concluding that Congress' 1999 appropriations rider *sub silentio* stripped Medicaid recipients of their vested statutory rights under § 1396k(b).

A month later, the Second Circuit decided *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001). On January 28, 2002, the First Circuit decided *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002). And on April 3, 2002, the Fourth Circuit decided *Strawser v. Atkins*, 290 F.3d 720 (4th Cir. 2002). Those Courts skipped the Eleventh Amendment question, and proceeded directly to Congress' 1999 amendment. Most recently on June 13, 2002 the Sixth Circuit decided *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002). Whereas the Seventh Circuit simply saw ambiguity and the Fifth Circuit simply saw a federal waiver and the Sixth found an Eleventh Amendment bar, the First, Second and Tenth Circuits found

clear and unambiguous evidence that Congress had quietly and retroactively stripped millions of Medicaid recipients of their vested statutory rights under section 1396k(b). App. 4a-5a.

The district and circuit courts require guidance.

II. Congress' 1999 Emergency Appropriations Rider Does Not Even Reference, Much Less Repeal, Section 1396k(b) or the Vested Rights Embodied Therein.

After intense lobbying by the States to prevent the federal government from claiming its share of the tobacco settlement as a Medicaid recovery, Congress included a rider to the Emergency Supplemental Appropriations Act of 1999 providing that HCFA would not treat tobacco settlement funds as an overpayment to the States for the purpose of offsetting future federal Medicaid matching funds. In other words, the federal government waived its claim to its share of the tobacco settlement.

The 1999 Amendment to 42 U.S.C. § 1396b(d)(3) provides as follows:

> (A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision therefor with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.
>
> (B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of Title 26 [26 U.S.C.A. § 5702(d)], and State Attorneys General, or as part of

any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19), a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3).

The Tenth, Second, and First Circuits have now concluded—based solely upon the last sentence of the appropriations rider—that rather than simply waiving the federal government's rights to its share of the tobacco settlement, which is all Congress ever debated, the rider somehow lurched into distant sections of federal Medicaid law, *sub silentio* repealed § 1396k(b)—a section of the Medicaid Act **50 pages away** in the United States Code—and retroactively stripped Medicaid recipients of substantial vested rights without ever mentioning § 1396k(b) or Medicaid recipients. Such an interpretation bears neither logical nor constitutional scrutiny.

A. The Text and Context of the 1999 Appropriations Rider Demonstrate Plainly That Congress Waived Only the Federal Government's Share of the Tobacco Settlement.

Congress expressly understood the tobacco settlement to be a Medicaid recovery, subject to supreme federal Medicaid law—and then chose to treat the tobacco settlement proceeds in the section of federal Medicaid law dealing with how the federal government calculates annual Medicaid payments it will make to states. The straightforward text and context of the 1999 appropriations rider confirms that it concerns *only*

the portion of the tobacco settlement to which the federal government would have been entitled.

Subsection **(A)** expressly refers to the "share to which the United States is equitably entitled." Subsection **(B)(i)** of the 1999 appropriations rider then says simply that this federal "share" shall not apply to the tobacco settlement. Subsection **(B)(ii)** then says that States may "use the sums described in clause (i) [*i.e.*, the federal share of the tobacco settlement] for any expenditures determined appropriate by the State."

The foregoing context and structure is significant. Congress targeted one, and only one section of federal Medicaid law—the section previously enumerated 1396b(d)(3), which it renumbered 1396b(d)(3)**(A)** in 1999, and to which it added subsection **B** to address only the "share to which the United States is equitably entitled." *See* 42 U.S.C. § 1396b(d)(3).[3]

Conspicuous as well is what Congress did *not* do—amend or repeal or even mention § 1396k(b)—which it easily could have done and would have been obliged to do if it intended such a radical divestiture of statutory property rights. Though "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change," *United States v. Fausto*, 484 U.S. 439, 453 (1988), the 1999 appropriations rider never mentions section 1396k(b), never mentions Medicaid recipients, and never mentions any intent to repeal or affect any other portion of federal Medicaid law.

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[3] By definition, of course, and as discussed in greater detail *infra*, appropriations measures concern *only* money going into or coming out of the federal government. They do not, and generally *cannot*, affect substantive statutory provisions, much less effect a massive confiscation of property belonging to private citizens.

The title of the appropriations rider[4] reinforces the specific and limited scope of Congress' concern: "PROHIBITION ON TREATING ANY FUNDS RECOVERED FROM TOBACCO COMPANIES AS AN **OVERPAYMENT** FOR THE PURPOSES OF MEDICAID." *See Conference Report on 1999 Emergency Supplemental Appropriations Act*, 145 Cong. Rec. H3175, 3200 (emphasis added). The technical term "overpayment" applies specifically and exclusively to funds to which the federal government would otherwise be entitled.[5]

The Tenth Circuit construed the 1999 appropriations rider to strip Medicaid recipients of their rights under § 1396k(b) by concluding that it would decline to consider any other evidence of congressional intent—context, legislative history, primary canons of construction, constitutionality, contrary rules in both houses of Congress, and common sense—because the last sentence was allegedly "plain" in stripping Medicaid recipients of their rights. Harris, 264 F.3d at 1294.

The Tenth Circuit effectively treated the last sentence of the appropriations rider as an independent statute, divorced from context and legislative history. Yet this Court has repeatedly emphasized that **text**—even assertedly "unambiguous"

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[4] While not a dispositive feature of statutory construction, the title of an enactment may certainly point the way—especially where, as here, the title specifically signals the scope of the enactment, and no other textual evidence points *specifically* to a different or larger scope. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Trainmen v. Baltimore & Ohio RR. Co.*, 331 U.S. 519, 528-529 (1947)).

[5] This meaning of the term "overpayment" is expressly set forth in the statute itself, at § 1396b(d)(3)(A), which existed before the 1999 Amendment and was merely renumbered to add "(A)."

text—depends upon **context**. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of statutory text "but also its placement and purpose in the statutory scheme."); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

Moreover, the Tenth Circuit's treatment of subsection (B)(ii) as an independent repeal of substantive Medicaid law renders the 1999 appropriations rider bizarre. If Congress had truly intended to say that states were free to spend all of the tobacco settlement proceeds in whatever manner they pleased, notwithstanding the § 1396k(b) distribution rules or any other provision of federal law, then Congress could have enacted a statute that simply **said that**. Congress need never have concerned itself with the technical subject of "overpayments." If states can spend all of the money however they please, then *a fortiori* none of the tobacco settlement proceeds constitute "overpayments" or are otherwise subject to any federal equitable entitlement. In other words, the Tenth Circuit interpretation renders superfluous every word in the 1999 appropriations rider except for clause (B)(ii). There would have been no need for clause (B)(i) if indeed Congress intended to liberate the states to spend all of the tobacco settlement proceeds however they please, notwithstanding any contrary provision of federal law.

This Court recently reiterated the critical canon of statutory construction that forbids exactly what the Tenth Circuit (as well as the Second and First Circuits) did. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, —, 122 S.Ct. 441, 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The question then naturally arises: why did Congress include language in subsection(B)(ii) that appears to free the states from constraint in spending tobacco settlement proceeds (or more precisely, the federal share of the tobacco settlement proceeds)? The answer, as the next section makes abundantly clear, is that the debate in Congress at the time of the 1999 enactment was on whether to give **the federal share** to the states without conditioning its use, or whether to give **the federal share** to states **with the stipulation that they must spend some or all of the federal share on specified health programs**. Those favoring conditions on the federal share lost. The rider ultimately enacted made clear that the federal government would not dictate how states must spend **the federal share**, despite the federal government's "equitable entitlement" to a substantial part of the tobacco settlement.

B. The Legislative History of the 1999 Appropriations Rider Unambiguously Confirms That Congress Addressed Only the Federal Share of the Tobacco Settlement.

The Senators debating the federal treatment of the tobacco settlement divided roughly into two camps: one that wanted to let the states keep the federal government share and spend it however they wish; and another that wanted to let the states keep the federal government share, but make them spend it (or a portion of it) on salutary health programs.

Typical of the camp opposing the rider that was ultimately enacted, and instead favoring conditions on spending the federal share of the tobacco settlement, was this statement by Senator Kennedy:

> States are free to use **the state share** of their recoveries in any way they choose. However,

> Congress has a clear and compelling interest in how **the federal share** will be used.

145 Cong. Rec. S2889-S2890 (March 18, 1999) (statement of Sen. Kennedy). Congress' focus *only* on **the federal share**—and the debate over whether the federal government would dictate how the States must spend **the federal share**—could hardly be more plain.

Senator Harkin, who sponsored a competing amendment, likewise hammered the central theme of the debate: whether Congress should impose spending conditions on **the federal share** of the tobacco settlement:

> I don't want to tell the States what to do with their money, but when the Federal taxpayers provide over 50 percent of Medicaid monies to the States and we are paying 50 billion bucks a year in health-related costs and much of that through Medicaid, then I think **we have a right and an obligation to say that some portion of that money that is Federal money** ought to go for health-related purposes.

145 Cong. Rec. S2886 (March 18, 1999) (statement of Sen. Harkin).

The ultimately enacted appropriations rider merely confirmed who won that debate: States would not be told by Washington how to spend **the federal share** of the tobacco settlement, despite the federal government's acknowledged claim to a substantial percentage of the states' Medicaid recovery. Instead, States could use that money—that is, the **federal share** specifically under consideration—"for any expenditures determined appropriate by the State." 42 U.S.C. § 1396b(d)(3)(B)(ii).

Most telling, the Conference Report concerning the appropriations rider expressly declares the subject of the enactment to be "**the Federal share of funds** recovered

under [tobacco] settlements or judgments." Conference Report on 1999 Emergency Supplemental Appropriations Act, 145 Cong. Rec. H3175, 3200 (emphasis added).[6]

Senator Hutchison herself, the rider's chief sponsor, stated that the federal government planned to "seize $18.9 billion of the State tobacco settlement funds **for Medicaid recoupment**." 145 Cong. Rec. S1145, 1157 (emphasis added). Senator Leahy from Vermont (a co-sponsor) similarly described the rider as "legislation to prohibit the **Federal government from recouping** any part of the [tobacco] settlement"). *Id.* at 1161 (emphasis added). Senator Levin from Michigan (another co-sponsor) stated: "I will support an amendment to this bill which will keep in the states any so called **'federal share' funds**"). 145 Cong. Rec. S2342 (emphasis added).

Additionally, every one of the letters submitted to Senator Hutchison by state and local entities in support of the rider makes clear that the purpose of the rider, was to prevent recoupment of **the federal share** of the tobacco settlement, and that no part of the debate pertained to the Medicaid recipients' share.[7]

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[6] *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation.'") (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

[7] *See, e.g.*, letter from National Governors Association ("A major priority for the nation's Governors during the 106th Congress is ensuring that state tobacco settlement funds are protected from unwarranted **seizure by the federal government**"); letter from National Association of Attorneys General (supporting the rider because it protects "the state tobacco settlements from **seizure by the federal government**"); letter from the National Association of Counties (referencing **"federal recoupment"** and **"the federal**

What is "plain," upon examination of the rider's text in its context, as amply reinforced by the legislative history, is that Congress treated **the federal share** of the tobacco settlement—nothing more, nothing less. The total silence of Congress with respect to § 1396k(b) and Medicaid recipients simply cannot yield a conclusion that Congress nevertheless stripped their substantive and vested rights in a sentence clearly rooted in the rights of the federal government vis-à-vis the states. As once observed by Chief Justice Rehnquist and appropriate here, "[i]n a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (internal quotations omitted) (quoted in *St. Cyr*, 533 U.S. at 320 n.44. Only judicial usurpation of a legislative function would now read § 1396k(b) out of the law by stealth.

C. Congress' 1999 Rider Could Not Have Properly Repealed Section 1396k(b) by Implication—Which Applies With Even Greater Force in an Appropriations Measure.

Whether reasonable minds may differ as to the meaning of the statutory text at issue, three observations about the 1999 appropriations rider are indisputable: (1) neither its text nor the legislative history ever mentions section 1396k or Medicaid recipients, much less discloses express intent to repeal that independent law or affect the rights of Medicaid recipients in any way; (2) the 1999 rider was an

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government's claim"); letter from the National League of Cities (supporting the rider because it "would prevent the **federal government** from taking a portion of state tobacco revenues"). 145 Cong. Rec. S1145, 1157-58.

appropriations measure, to which specific rules and limitations apply in the task of interpretation; and (3) Petitioner's interpretation of the 1999 appropriations rider, as amply supported by textual cues and legislative history, is *at least* a plausible interpretation that harmonizes all relevant parts of federal Medicaid law. Taken together, these propositions yield a single conclusion consistent with controlling precedent: Congress did not strip Medicaid recipients of their section 1396k rights.

"[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." *Rodriguez v. United States*, 480 U.S. 522, 524 (1987)) (citations and internal quotation marks omitted). "In the absence of some affirmative showing of intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *accord United States v. Boffa*, 688 F.2d 919, 932 (3d Cir. 1982). There is clearly no "positive repugnancy between the provisions" of section 1396k(b) and section 1396b(d)(3), as would be required for a finding of a legislative intent to repeal Section 1396k. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).[8]

Section 1396b(d)(3) and section 1396k(b) *can* be read in harmony, and therefore *must* be read in harmony. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) ("[W]here two statutes are capable of co-existence, it is the

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[8] Technically, the Tenth, Second, and First Circuit constructions of the 1999 amendment constitute a "partial" implied repeal of section 1396k(b), as only rights with respect to the tobacco settlement are purportedly affected. The difference is irrelevant. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.").

duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). Section 1396b(d)(3) prohibits the reduction of future federal Medicaid payments to states based upon tobacco settlement proceeds, and then (a) imposes no specific restrictions on the states' ability to spend that *federal* portion of the settlement, and (b) imposes no specific restrictions on the states' ability to spend *their legal portion* of the settlement amount. Section 1396k(b) provides that any portion of the settlement amount that exceeds the state and federal government's Medicaid costs, and that is therefore neither the "federal" portion nor the states' "legal portion" of the settlement amount, shall go to the injured Medicaid recipients.

Any decision interpreting Congress' 1999 appropriations rider as anything other than a waiver of the federal government's share of the tobacco settlement proceeds creates a new and unprecedented principle of interpreting, and erasing, legislative enactments, and arrogates to the judiciary a function assigned to Congress by the most fundamental principles of our federalist form of government. *See Rotec Industries, Inc. v. Mitsubishi Corp.*, 215 F.3d 1246, 1258 (Fed. Cir. 2000).

The Second and Tenth Circuit took artificial refuge in one canon of statutory construction—and misapplied it—in holding that the 1999 appropriations rider constitutes a "specific" statute that governs the "general" statute in section 1396k(b). The Tenth Circuit simply ignored the cardinal canon of construction—especially in the context of implied repeals: if two statutes *can* be reconciled, they *must* be reconciled. *Monsanto Co.*, 467 U.S. at 1018.

Moreover, there is not, in fact, any applicable "specific over general" statute here. In its 1999 amendment, Congress addressed one aspect of the tobacco settlement. Congress was obviously *not* "specific"—quite the opposite—about the

rights of Medicaid recipients. The only statute "specifically" addressing the rights of Medicaid recipients is § 1396k(b). The "specific over general" proposition might have applied *if* Congress had "specifically" amended § 1396k(b) and made it clear that the tobacco settlement was to be exempted from 1396k(b)'s mandate. In that event, regardless whether Congress had mentioned Medicaid recipients (though it would have been peculiar not to), its more specific *later* treatment **of § 1396k(b)** would have governed that statute's general mandate.

To the rigorous presumption against implied repeal, this Court has added an even more forceful condemnation of implied repeals in **appropriations** measures. *See especially TVA*, 437 U.S. at 190 (doctrine disfavoring repeals by implication applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act"). In *TVA v. Hill*, this Court emphasized the significant practical danger of reading too much about substantive law into appropriations measures, upon which Congress itself has fastened strict limitations on scope. Id. at 190-191 (citing House Rule XXI(2) and Standing Rules of the Senate 16.4)

One authority described the critical federalist underpinning of this principle as follows:

> A doctrine that valuably distinguishes the judicial and legislative roles is the principle that federal courts do not assume that Congress uses one statute to implicitly repeal an earlier one. ... Repeal in an appropriations statute, in particular, is an acceptable conclusion only if Congress expressly relates the appropriations proviso to a previous law. The appropriations language must leave no doubt about legislative intent, like stating that no funds may be available to implement a previously authorized

purpose, "notwithstanding" stated portions of the law identified in the appropriations bill.

L. Fisher, Statutory Construction: Keeping a Respectful Eye on Congress, 53 SMU L. Rev. 49, 61 (Winter 2000) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)); *accord Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992). Nothing in the 1999 appropriations rider even remotely satisfies these conditions for implied repeal in an appropriations measure.

Any determination that Congress' rider to the 1999 Emergency Supplemental Appropriations Act somehow repealed the disbursement requirements contained in section 1396k(b) would (1) erroneously disregard the rigorous presumption against repeals by implication, *and then* (2) erroneously assume "that Congress meant to repeal *pro tanto* § [1396k(b)] of the [Medicaid] Act by means of a procedure expressly prohibited under the rules of Congress," *TVA*, 437 U.S. at 191, *and then* (3) erroneously insist that Congress did this remarkable deed without ever even mentioning § 1396k(b) or the rights embodied therein.

The Tenth Circuit opinion does not addressed the issue of limitations on the scope of appropriations measures. And this case, perhaps even more than *TVA v. Hill*—with which the Tenth Circuit opinion irreconcilably conflicts—demands application of the principle that appropriations measures cannot repeal substantive law located fifty pages away in the United States Code without any hint of intention to do so.

D. Interpreting Congress' 1999 Appropriations Rider to Destroy Medicaid Recipients' Vested Remainder Rights Poses Serious Constitutional Problems and Must Therefore Be Avoided.

Under the law that existed when the MSA was executed (and, Petitioners contends, still exists), Petitioners and others

similarly situated acquired a § 1396k(b) right to the remainder of the state's Medicaid recovery. Thereafter, Congress enacted § 1396b(d)(3). According to the Tenth Circuit, Petitioner thereupon lost that extraordinarily valuable property right—though Congress never mentioned any intent to affect Medicaid recipients at all, much less extinguish their entitlement to future proceeds of an executed settlement.[9] Such a result impermissibly operates retroactively *and* works an unconstitutional taking—infirmities easily avoided by doing what this Court commands in the first instance: harmonizing two statutes where that is fairly possible.

"A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321 (internal quotations omitted). Assuming only *arguendo* that Congress had the power even *expressly* to repeal the disbursement provisions of § 1396k for purposes of the tobacco settlement,[10] it did no such thing.

"[T]he first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law

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9 There can be no dispute that the § 1396k(b) remainder interest is a protected property interest. Among other indicia, state law routinely recognizes the competing property interests in recoveries by Medicaid recipients. *See, e.g., Roberts v. Total Health Care*, 349 Md. 499, 513, 709 A.2d 142, 148 (1998) ("To the extent the settlement proceeds were intended to compensate for medical care they were not the property of the [Medicaid] recipients."). Here, Congress adds its express imprimatur through § 1396k(b).

10 For purposes of assessing the constitutionality of confiscating Petitioner's § 1396k(b) remainder interest, it is irrelevant that the precise amount due cannot yet be quantified. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980).

be applied retrospectively." *Id.* at 316 (citing *Martin v. Hadix*, 527 U.S. 343 (1999)). The most rudimentary threshold for such "clarity" would require, at a minimum, express identification of (a) the specific right to be stripped; and (b) the class of people whose substantive rights are to be stripped. Congress identified neither. Indeed, this Court has observed that cases where it "has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

Moreover, as this Court recently emphasized, statutes must be interpreted to avoid *not* merely unconstitutional results, but "difficult constitutional questions." *Id.* at 300 & n.13. Where, as clearly here, "an alternative interpretation of the statute" that avoids any constitutional thicket is "fairly possible," courts "are obligated to construe the statute to avoid such problems." *Id.* at 300. The threshold constitutional proposition—that § 1396k(b) confers on Plaintiffs a vested property interest that § 1396b(d)(3) would extinguish by stealth according to some circuits—raises a sufficient constitutional problem to opt against reading § 1396b(d)(3)(ii) in a vacuum. And, more to the point, no such reading and no such interpretive entanglement is necessary, as the alternative construction pressed herein is more than "fairly possible."

Conclusion

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FISHER, CAVANAUGH, SMITH & LEMON, P.A.

Stephen W. Cavanaugh
Counsel of Record
Harold A. Houck
2942A S.W. Wanamaker Drive, Suite 100
Topeka, Kansas 66614-4135
(785) 440-4000

Attorneys for Petitioners

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND FILED APRIL 30, 2002

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 01-3097
(D.C. No. 00-CV-4054-SAC)
(District of Kansas)

JUDITH CLARK; JOHN C. PULEO; TAMMY THOMAS; ALFRED CAIRE; MITCHELL DAVISON; OREN HAMILTON; NADINE PERGESON; FELIX H. STROMAN, JR., and all others similarly situated, their next of kin, heirs, or personal representatives,

Plaintiffs - Appellants,

v.

CARLA STOVALL, Attorney General; JANET SCHALANSKY, Secretary of Kansas Department of Social and Rehabilitation Services; CITIBANK NA,

Defendants - Appellees.

ORDER AND JUDGMENT*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Appendix A

Before **SEYMOUR**, Circuit Judge, **McWILLIAMS**, Senior Circuit Judge, and **GIBSON**, Senior Circuit Judge.**

Judith Clark ("Clark") and seven others brought a class action suit on April 12, 2000, under the Medicaid Act (42 U.S.C. § 1396, et. seq.) in the District Court for the District of Kansas, naming as defendants the Attorney General of Kansas, Carla Stovall ("Stovall"), the Secretary of the Kansas Department of Social and Rehabilitation Services, Janet Schalansky ("Schalansky"), and Citibank N.A. ("Citibank"). Citibank was described in the complaint as the escrow agent designated by the parties to the tobacco litigation Master Settlement Agreement to receive, manage and disburse settlement monies to be paid by the tobacco companies to the State of Kansas. In their amended complaint filed May 3, 2000, the class sought, *inter alia*, prospective relief, and relied on 42 U.S.C. § 1396k(b), which provides that the amounts of monies received pursuant to the Master Settlement Agreement by a State should be disbursed in a certain manner, with the further prevision that "the remainder of such amount collected shall be paid to such individual."

Stovall and Schalansky filed a joint motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim and also sought dismissal on the grounds that the action was barred by the Tenth and Eleventh Amendments to the United States Constitution. Citibank filed a separate motion to dismiss, alleging that the class had failed to state a claim upon which

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** Honorable John R. Gibson, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

relief could be granted and, also alleging that if the claim against Stovall and Schalansky was dismissed, such "would require dismissal of all claims against Citibank as well." Memorandum briefs were filed both in support of, and in opposition to, these motions.

In a 22-page "Memorandum and Order" filed by the district court on March 2, 2001, the court granted both the joint motion to dismiss filed by Stovall and Schalansky and the separately filed motion to dismiss of Citibank. On that same date, judgment was entered ordering that the "plaintiff take nothing and the action is dismissed," and that the defendants recover from the plaintiffs "its costs of action." *Clark v. Stovall*, 158 F.Supp.2d 1215 (D. Kan. 2001). The class now appeals the judgment thus entered.

In granting the defendants' motions to dismiss, the district court specifically stated in its "Memorandum and Order" that as to each motion and each defendant the court granted the respective motion "on Eleventh Amendment immunity grounds." No mention whatsoever was made by the court on the alternative ground urged by the defendants that the action was subject to dismissal for failure to state a claim under Rule 12(b)(6).

Subsequent to the district court's order and judgment in the instant case and, after briefing in this Court, we filed our opinion in *Harris v. Owen*, 264 F.3d 1282 (10th Cir. September 10, 2001). The parties to the present appeal thereafter filed "supplemental authority" concerning *Harris*. The problem is whether *Harris* controls the outcome of the present case. We conclude that it does.

Appendix A

In *Harris*, a panel of this Court held, contrary to the holding of the district court, that an action of the same type brought by Clark, and the others, in the instant case is *not* barred by the Eleventh Amendment. However, in *Harris* we then went on to hold that the complaint in that case failed to state a claim upon which relief could be granted because Congress in 1999 added a rider to the Emergency Supplemental Appropriations Act, Pub.L. No. 10631, 113 Stat. 57, 103-04 (1999), which provided that "funds received under the Master Settlement Agreement are not subject to the distribution requirements of § 1396k(b)." *Harris* at 1297. That rider, which now appears as 42 U.S.C. § 1396b(d)(3)(B)(ii), provides as follows:

> Except as provided in subsection (i)(19) [which prevents federal funding for the states' administrative costs of tobacco litigation], *a State may use amounts recovered or paid* to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) [which specifically names the 1998 Master Settlement Agreement] *for any expenditures determined appropriate by the State.*

The district court in *Harris* dismissed the action on two grounds, i.e., it was barred by the Eleventh Amendment and the complaint failed to state a claim upon which relief could be granted. The district court in the instant case relied solely on the Eleventh Amendment and did not discuss the "failure to state a claim" question. However, in view of our "intervening" opinion in *Harris*, we conclude that based on the present record we are in a position to rule on the question of whether

the amended complaint states a claim upon which relief can be granted. In other words, we need not reverse the present judgment and remand to the district court so that it, in the first instance, would consider the question of whether the amended complaint states a claim for relief. Accordingly, we elect to decide that particular question now.[1]

Harris clearly dictates the conclusion that because of 42 U.S .C. § 1396 b(d)(3)(B)(ii) the amended complaint in the instant case does not allege a claim upon which relief could be granted and is subject to a Rule 12(b)(6) motion. Indeed, at oral argument, counsel's position was that *Harris* was "wrongly decided," and should be disavowed by the Court, sitting en banc, in the instant case. In thus arguing, counsel recognized that this panel is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). We are not persuaded by counsel's suggestion that two superseding decisions by the Supreme Court render *Harris* "suspect and open for reconsideration." Whether *Harris* is "suspect" is doubtful, and, of course, "reconsideration," if any, would be by the en banc court, and not by this panel.

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1. This Court may affirm a district court decision "on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." *Dominion Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149 (10th Cir. 2001); *United States v. Sandoval*, 29 F.3d 537 (10th Cir. 1994); *Seibert v. State of Okla., ex rel. University of Okla. Health Sciences Ctr.*, 867 F.2d 591 (10th Cir. 1989)

Accordingly, we affirm the district court's judgment dismissing the action against all defendants, although we disapprove the district court's ground for so dismissing, i.e., the Eleventh Amendment. Rather, relying on *Harris*, we affirm the district court's judgment on the ground that the amended complaint fails to state a claim upon which relief can be granted.

Judgment affirmed.

Entered for the Court

Robert H. McWilliams
Senior Circuit Judge

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED MARCH 2, 2001

IN THE UNITED STATES DISTRICT COURT FOR DISTRICT OF KANSAS

No. 00-4054-SAC

JUDITH CLARK; JOHN C. PULEO; TAMMY THOMAS; ALFRED CLAIRE; MITCHELL DAVISON; OREN HAMILTON; NADINE PERGESON; FELIX H. STROMAN, JR., and All Others Similarly Situated, Their Next of Kin, Heirs, or Personal Representatives,

Plaintiffs,

Vs.

ATTORNEY GENERAL CARLA STOVALL, SECRETARY OF KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES JANET SCHALANSKY, and CITIBANK, N.A.,

Defendants.

MEMORANDUM AND ORDER

The case comes before the court on the motion to dismiss (Dk. 25) filed by the defendants Kansas Attorney General Carla Stovall ("Attorney General") and Secretary of Kansas Department of Social and Rehabilitation Services Janet Schalansky ("S.R.S. Secretary") (jointly referred to as the "state defendants") and the motion to dismiss (Dk. 42) filed

by the defendant Citibank, N.A. The plaintiffs move for oral argument on these motions. (Dk. 45). Considering the parties' detailed briefs and the recent number of judicial decisions on these same issues, the court believes oral argument is unnecessary and would not materially contribute to this proceeding. The court denies the motion for oral argument.

BACKGROUND

In November of 1998, the State of Kansas along with over forty other states entered into a Master Settlement Agreement ("M.S.A.") that was valued in excess of $200 billion and that settled the states' claims against major tobacco companies. Another court recently described the M.S.A. in these terms:

> The M.S.A., in part, compensates the states for past and future medical expenses occasioned by state underwritten treatment of tobacco-related illnesses. Payments under the M.S.A. will be made to the states over two and one-half decades. The M.S.A. does not resolve and release claims for "private or individual relief for separate and distinct injuries . . . or . . . recovery of health-care expenses" by individuals. (M.S.A. at II (pp)(2)(A) & (B)).

Strawser v. Lawton, __ F. Supp. 2d __, 2001 WL 8406 (S.D. W. Va. Jan. 3, 2001). As alleged in the amended complaint, Kansas expects to receive approximately $1.767 billion from the settlement which will be paid out in

installments over the next twenty-five years.[1] (Dk. 15, ¶ 8). Kansas received its first payment in December of 1999, and it totaled $20,583,592.26. *Id.*

The plaintiffs are Kansas residents who suffer from smoking-related illnesses and who have received medical assistance benefits from the Kansas Medicaid program for the care and treatment of these illnesses. The plaintiffs seek to certify a class and obtain a declaratory judgment that the State of Kansas must comply with federal Medicaid laws and "seek reimbursement of the medical assistance payments made through the state Medicaid program from known legally liable third parties such as those tobacco companies already identified by the state" and then distribute the recovery consistent with the federal Medicaid Act which requires any amount in excess of that needed to reimburse the state and

---

1. The Seventh Circuit recently explained that the payments under the M.S.A. are subject to adjustment and are not tied to any particular claims:

> "As Wisconsin and the other states point out, the total sums of money to be paid under the M.S.A. are not earmarked for different claims. Some of it is to go to educational programs; some of it to research; some to reimbursement of the state's expenses in treating sick people and in supporting families whose wage-earners are disabled from smoking; some is frankly punitive. The final amount to be paid, after 25 years have elapsed, is unknown and unknowable at this point, because it depends partly on how successful the anti-smoking campaigns turn out to be."

Floyd v. Thompson, 227 F.3d 1029, 1038 (7th Cir. 2000).

federal programs to be distributed to the individual Medicaid recipients. They also seek an order enjoining the defendants to disburse or to cause disbursement to the plaintiffs the portion of the tobacco litigation settlement proceeds that belongs to the plaintiffs before placing those proceeds in the state treasury or otherwise giving the state possession or control of those proceeds. They seek other injunctive relief related to recovering their property interest in rights assigned to the state under the Medicaid Act, to obtaining due process with respect to those property interests previously taken or to be taken in the future, to segregating the settlement payments from the state treasury and obtaining an accounting and disbursement of them in accordance with the Medicaid Act, to retaining the settlement proceeds and notifying plaintiffs of the procedure for obtaining their share of them, and to seeking reimbursement of medical assistance payments from tobacco companies and other known legally liable third parties according to the requirements of the Medicaid Act.[2]

---

2. In analyzing the Eleventh Amendment issues, the court will focus on the plaintiffs' claim for injunctive relief and will not discuss separately the other claims for relief. This approach is in keeping with Tenth Circuit precedent:

> "[N]either notice nor declaratory relief is the 'type of remedy designed to prevent ongoing violations of federal law.' " *See Green* [*v. Mansour*], 474 U.S. [64] at 70-74 (1986)]. Thus, the Eleventh Amendment bars a federal court from ordering notice relief in a suit against the state, unless it is ancillary to a judgment awarding prospective injunctive relief. *Id.*

Johns v. Stewart, 57 F.3d 1544, 1553 (10th Cir. 1995).

Appendix B

Sued in their official capacities, the Attorney General and S.R.S. Secretary seek dismissal arguing principally: state sovereign immunity, plaintiffs' failure to state a claim for relief, court's lack of subject matter jurisdiction, and plaintiffs' lack of standing. Sued in its capacity as the escrow agent for the state's settlement funds, Citibank seeks dismissal arguing plaintiff's failure to state a claim for relief. The court joins the growing number of courts to recognize the state's sovereign immunity in such litigation.

FEDERAL MEDICAID PROGRAM

Established in Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v, and designed to finance health care services for the indigent, Medicaid is a cooperative federal-state venture administered by appropriate state agencies. *Floyd v. Thompson*, 227 F.3d 1029, 1031 (7th Cir. 2000). "Kansas has elected to participate in the Medicaid program established by Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396u". *Kansas Health Care Association, Inc. v. Kansas Dept. of Social and Rehabilitation Services*, 958 F.2d 1018, 1019 (10th Cir. 1992). As a voluntary participant in this program, Kansas "must comply with federal Medicaid laws and regulations." *Id.* at 1020 (citing *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)). To participate and receive federal funding, a state must submit and have approved its comprehensive plan for medical assistance.

The Medicaid Act requires a state plan to "provide . . . that the State . . . agency administering such plan will take all reasonable measures to ascertain the legal liability of third

parties . . . to pay for care and services available under the plan." 42 U.S.C. § 1396a(a)(25)(A). The state plan must also provide:

> (B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability. . . .

42 U.S.C. § 1396a(a)(25)(B). To assist in recovering payments for medical support and care owed to those who have received Medicaid assistance, a state plan also must:

> (1) must provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required —
>
> (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;. . . .

42 U.S.C. § 1396k(a).

Appendix B

The Medicaid Act regulates the "distribution of any recovery from a third party in a manner that parallels the usual subrogation rules." *Floyd v. Thompson*, 227 F.3d at 1032. The Act provides:

> Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

42 U.S.C. § 1396k(b). A supporting regulation offers more explanation:

> The state agency must distribute collections as follows —
>
> (a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.
>
> (b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with § 433.153.

> (c) To the recipient, any remaining amount. This amount must be treated as income or resources under Part 435 or Part 436 of this subchapter as appropriate.

42 C.F.R. § 433.154.

In reliance on these Medicaid Act provisions, the plaintiffs claim that the State of Kansas' suit against the tobacco companies was a Medicaid reimbursement action and that the distribution requirements found in § 1396k(b) and explained in 42 C.F.R. § 433.154 entitle them to some portion of the settlement proceeds being paid in annual installments pursuant to the M.S.A. Broken down into its inferential parts, the plaintiffs' claim is that:

> (1) the tobacco companies are third parties liable to Medicaid recipients injured by cigarettes; (2) the recipients assigned their claims to the State; (3) the State's suit against the tobacco companies was a Medicaid reimbursement action pursuant to subsection 1396k(b); (4) there is a "remainder" from the settlement with the tobacco companies under subsection 1396k(b); and (5) [Kansas] . . . has a mandatory obligation to pay over the remainder to Medicaid recipients injured by tobacco products.

Strawser v. Lawton, __ F. Supp. 2d __, 2001 WL 8406. The plaintiffs primarily base their allegation of the prior suit being a Medicaid reimbursement action upon the statutory assignment of their third-party claims as well as the State of

Kansas' petition that sought " 'compensation . . . for past and future damages, including but not limited to health care expenditures, caused by defendant's actions in violation of the laws of the State of Kansas' and for 'restitution for the smoking-related health care costs paid by the state through its various statutory medical programs, including the programs established pursuant to K.S.A. 39-701, *et seq.*" (Dk.15, ¶ 49). The plaintiffs now seek to enforce the Medicaid Act's requirements for the distribution of these proceeds.

ELEVENTH AMENDMENT IMMUNITY[3]

The state defendants argue that the plaintiffs' suit is barred by the Eleventh Amendment in that the relief sought is the practical equivalent of monetary damages paid from the state treasury. "The state's interest in the settlement proceeds is not a mere expectancy, rather the state has already earned the moneys by virtue of the state court's final judgment and has structured receipt of the payments over time." (Dk. 25,

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3. The state defendants assert the *Rooker-Feldman* doctrine bars this court from entertaining this suit. Because a *Rooker-Feldman* challenge goes to jurisdiction, it is the court's "first duty" to decide whether it has "jurisdiction to entertain and decide a case on its merits." *Thompson v. United States*, 291 F.2d 67, 68 (10th Cir. 1961); *see Snodderly v. Kansas*, 79 F. Supp. 2d 1241, 1247 (D. Kan. 1999). The defendants' use of this doctrine is flawed in that the plaintiffs were not parties to the underlying state litigation. The *Rooker-Feldman* doctrine bars "a party losing in state court . . . from seeking what in substance would be appellate review of the state judgment in a United States district court." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). The *Rooker-Feldman* doctrine should not be applied against non-parties. *Johnson v. Rodrigues*, 226 F.3d 1103, 1109 (10th Cir. 2000).

p. 12). Relying on the doctrine from *Ex parte Young*, 209 U.S. 123 (1908), the plaintiffs insist their action sidesteps the immunity issue by suing state officials for prospective equitable relief to prevent a continuing violation of federal law.

"Eleventh Amendment immunity bars damages actions against a state in federal court." *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000) (citations omitted). "[O]nce effectively asserted such immunity constitutes a bar to the exercise of federal subject matter jurisdiction." *Fent v. Oklahoma Water Resources Board*, 235 F.3d 553, 558 (10th Cir. 2000). Of the three-judicially created methods for circumventing this immunity, the one advanced here is the *Ex parte Young* doctrine. Though the state is generally the real party in interest when a state official is sued for acting in his official capacity, this doctrine creates a narrow exception when the suit seeks prospective injunctive relief for ongoing violations of federal law. *Elephant Butte Irr. Dist. of New Mexico v. Department of Interior*, 160 F.3d 602, 607-08 (10th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999). The *Ex parte Young* doctrine "enables federal courts 'to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States.' " *Buchwald v. University of New Mexico School of Medicine*, 159 F.3d 487, 495 (10th Cir. 1998) (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (quoting in turn *Ex parte Young*, 209 U.S. at 160)). This narrow exception requires that there "be an ongoing violation of federal law" and that it apply "only to prospective relief" and not "to obtain a declaration that a state officer has violated a plaintiff's federal rights in the past." *Buchwald*, 159 F.3d at 495 (quotations omitted). "For years, the Supreme Court has

applied *Ex parte Young* to allow suits for prospective relief against a state officer to enjoin future violations of federal law, but it has consistently prohibited any retroactive or compensatory relief." *Elephant Butte*, 160 F.3d at 608.

Ongoing Violation of Federal Law

"Because the states cannot authorize any act that violates federal law, the Supreme Court has established that an action seeking to prospectively enjoin a state official's ongoing violation of federal law is not barred by the Eleventh Amendment." *Elephant Butte*, 160 F.3d at 609 (citation omitted). The parties' briefing largely ignores this requirement of the *Ex parte Young* doctrine. The state defendants, however, do argue they are acting pursuant to state law and lack the authority to alter or ignore Kansas statutes governing the treatment of the tobacco settlement proceeds. "Even though the state officials claim to act under the authority of valid state law, if their conduct is not in accord with federal law the state cannot cloak their actions with state authority or state immunity." *Id.* (citation omitted). The general rule, however, remains that "if the state officials' conduct was authorized by state law, and no federal rights were infringed, then the alleged violation of Plaintiffs' rights is merely tortious interference with property rights, and the Eleventh Amendment bars federal jurisdiction." *Elephant Butte*, 160 F.3d at 610 (citation omitted).

It is for the court to decide whether the plaintiffs "state a non-frivolous, substantial claim for relief against the state officials that does not merely allege a violation of federal law solely for the purpose of obtaining jurisdiction." *Elephant*

Butte, 160 F.3d at 610 (quotation omitted). To date, at least four courts have rejected other Medicaid recipients' similar claims of entitlement to M.S.A. proceeds after finding no violation of federal law, ongoing or not. *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000); *Tyler v. Douglas*, 2000 WL 1146575 (D. Vt. June 21, 2000); *Skillings v. Illinois*, 121 F. Supp. 2d 1235 (C.D. Ill. 2000); *Strawser v. Lawton*, __ F. Supp. 2d __ (S.D. W. Va. Jan. 3, 2001).

Bypassing the "complex" Eleventh Amendment analysis, the Seventh Circuit considered whether the scope of the M.S.A. provided the plaintiffs with any possible suit for a Medicaid violation. *Floyd v. Thompson*, 227 F.3d at 1035. The circuit panel keyed on the M.S.A. language that released claims of individuals "only insofar as they are suing on general injuries, not insofar as they are seeking 'solely . . . private or individual relief for separate and distinct injuries.' " 227 F.3d at 1037 (quoting M.S.A. ¶ II(pp)(2)(A)). The court concluded:

> We read this to indicate that the M.S.A. itself recognized that the assignments the states received might not include all claims related to health-care expenses and that it did not purport to extinguish the claims of individual persons who were not part of the settlement process (a move that would have been problematic at best). . . .
>
> The Floyd plaintiffs recognize that they have no right to the monies actually expended by the state for the provision of medical services to recipients of assistance. The subrogation right of

> § 49.89(2) makes that clear, as does the allocation scheme of 42 C.F.R. § 433.154. Since those are the only claims for medical treatment that Wisconsin settled, or perhaps even could settle given the restrictive scope the Wisconsin Supreme Court has now given to the assignment provision of § 49.45(19)(a)2, it follows that there is nothing in the M.S.A. to which the plaintiffs may assert a claim.

227 F.3d at 1037. Put another way, the allocation scheme set forth in 42 U.S.C. § 1396k(b) and explained in 42 C.F.R. § 433.154 is not violated, because the only assigned claims settled by the M.S.A. were for monies that the state actually expended to provide medical services to recipients and the federal law gives the plaintiffs as Medicaid recipients no rights or claims to those monies. While the Seventh Circuit did look at Wisconsin's law on a Medicaid recipient's limited assignment of rights, the court focused on the M.S.A. and the care taken in that document "to limit the *parties* releasing claims to the Settling States and their various subdivisions and constituent institutions." 227 F.3d at 1037. "That Wisconsin was limited in its authority to resolve the claims of public aid recipients reinforced the court's interpretation of the limited scope of the released claims, but that does not mean that the terms of the M.S.A. would have different meanings in different states." *Skillings v. Illinois*, 121 F. Supp. 2d 1235, 1238 (C.D. Ill. 2000) (Following *Thompson*, the court held that "[w]hatever the State of Illinois may have intended to resolve originally does not alter the fact that the M.S.A. ultimately resolved only those claims belonging exclusively to the states").

Appendix B

Not unlike *Thompson* or *Skillings*, the federal district court in Vermont construed the M.S.A. to involvement payments "cover[ing] a variety of actual or non-medical damages accrued by the State" but not "separable, excess recovery which Congress contemplated as payable to an individual under the Medicaid Act." *Tyler v. Douglas*, 2000 WL 1146575 (D. Vt. June 21, 2000). For that matter, the M.S.A. by its terms does not resolve the tobacco companies' legal liability as a third-party for any Medicaid recipient's injuries. *Id.* (citing M.S.A. at § XVIII(e) ("This Agreement is not intended to be and shall not in any event be construed or deemed to be . . . an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party. . . .")); 42 U.S.C. § 1396a(a)(25) (a finding of a third party's "legal liability" triggers the recipient-reimbursement obligations). Besides the M.S.A., the court in *Tyler*, as did the court in *Strawser*, interpreted the 1999 amendments to the Medicaid Act as excepting states that participated in the M.S.A. from the normal distribution requirements and giving those states exclusive control over the settlement proceeds:

> The new statute provides:
>
> > (i) Subparagraph (A) [dealing with the federal pro rata share of net recoveries by a state plan to which the United States is equitably entitled] and paragraph (2)(B) [dealing with treatment of reimbursements by liable third parties to the State for injured recipient expenditures] shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products,

> . . ., and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19) [providing for state payment of litigation costs and expenses of pursuing the tobacco litigation], a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

42 U.S.C. § 1396b(d)(3)(B)(i) and (ii). . . .

. . . .

> In the Court's view, the statute is an unambiguous Congressional mandate vesting in the participating states a complete right, title, and interest to the settlement proceeds, excepting only litigation expenses. Hence, there is no ongoing violation of federal law, and *Ex parte Young* is inapplicable.

Strawser, 2001 WL 8406, *see Tyler*, 2000 WL 1146575, at *2 ("[I]n light of the plaintiff's failure to allege a violation of federal law which arises from Vermont's participation in the tobacco settlement, this complaint is barred by the Eleventh Amendment.").

The cogent reasoning employed by these other courts in finding no violation of federal law is persuasive here. The Medicaid Act plainly gives the plaintiffs no right to monies that the state actually expended on them for medical assistance. The M.S.A. does not purport to settle any other claims for medical treatment or assistance, particularly those individually assigned by recipients to the State of Kansas. Consequently, the plaintiffs are unable to assert any violation of federal law from the state's failure to share the settlement proceeds with them. The state's reimbursement obligations under its plan are not triggered until a legal liability is found, and the M.S.A. here does not establish the tobacco companies' legal liability for any Medicaid recipient's injuries. Finally, because the 1999 Medicaid amendments specifically addressed the M.S.A. and gave the states exclusive control over the tobacco settlement proceeds, the plaintiffs cannot reasonably assert a Medicaid Act violation. In sum, these conclusions rule out any substantial claim that the state defendants are committing an ongoing violation of federal law by not sharing or distributing settlement proceeds with the plaintiffs.[4] The plaintiffs' claim is insufficient to sustain federal jurisdiction.

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4. The court recognizes that the plaintiffs' amended complaint includes the conclusory allegation that the state's failure to sue on their behalf is an ongoing violation of federal law. The plaintiffs, however, do not devote any arguments in their briefs to this allegation nor cite any authority for such a federal claim. Frankly, the court is at a loss to see any legal or factual bases in the plaintiffs' amended complaint for such an action. For that matter, the M.S.A. does not establish any legal liability on behalf of the tobacco companies as to require the state to seek reimbursement. 42 U.S.C. § 1396a(a)(25)(B).

Appendix B

Prospective Relief

To date, most courts addressing these same claims and issues have relied on this prong principally or, at least, alternatively in dismissing the state defendants on Eleventh Amendment grounds. *See, e.g., Cardenas v. Anzai*, __ F. Supp. 2d __, 2001 WL 58857 (D. Haw. Jan. 18, 2001) (principal ground); *Strawser v. Lawton*, __ F. Supp. 2d __, 2001 WL 8406 (S.D. W. Va. Jan. 3, 2001) (alternative ground); *Martin v. New Mexico*, 197 F.R.D. 694, 696 (D. N.M. 2000) (principal ground); *McClendon v. Georgia Dept. of Community Health*, No. 00-CV-0026 (N.D. Ga. Aug. 28, 2000) (alternative ground); *Barton v. Summers*, 111 F. Supp. 2d 989, 991-92 (M.D. Tenn. 2000); *Harris v. Owens*, No. 99-S-953 (D. Colo. Jan. 19, 2000) (Magistrate Judge's Report and Recommendation adopted July 19, 2000) (alternative ground); *Floyd v. Thompson*, 111 F. Supp. 2d 1097 (W.D. Wis. 1999) (principal ground), *aff'd on other grounds*, 227 F.3d 1029 (7th Cir. 2000). As was done in those decisions, this court rejects the plaintiffs' efforts to paint the horse a different color.

The states and the tobacco companies settled their litigation and fixed the obligations and rights of each in the M.S.A. *Martin*, 197 F.R.D. at 696 ("it is irrelevant that the money has not yet been deposited in the state treasury"). Unlike the claim in *Elephant Butte Irrigation Dist. of New Mexico v. Department of Interior*, 160 F.3d 602, 611 (10th Cir. 1998), which requested relief that affected only "the state's right to future revenues" and barred the state from retaining profits, if any, to be earned in the future, the M.S.A. ensures and entitles a state to receive money each year as a result of settling a lawsuit over alleged past violations of law.

See Barton v. Summers, 111 F. Supp. 2d at 992. It is true that the amount of payments will depend on outside factors or subsequent adjustments, that the tobacco companies have legal title to the escrowed funds, and that the installment payments are to be made in the future. As the other courts have observed, however, these circumstances do not change what are the irrefutable facts making the relief here retroactive, rather than prospective. Namely, the payments are being made in settlement of past claims, the mode of payments is installment as opposed to a lump sum settlement, the amount of installment payments is computed from terms fixed by the M.S.A., and the states have a "vested right" or "equitable title"[5] to the escrowed funds. *Cardenas v. Anzai*, __ F. Supp. 2d __, 2001 WL 58857 at *3-*5; *Strawser v. Lawton*, __ F. Supp. 2d __, 2001 WL 8406 n.6; *Barton v. Summers*, 111 F. Supp. 2d at 992-93; *Floyd v. Thompson*, 111 F. Supp. 2d at 1100-1101.

Though the plaintiffs couch their claims in terms of injunctive and declaratory relief, "the reality is that plaintiffs are demanding a portion of the tobacco settlement, a claim

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5. The court in *Strawser* further observed:

> "From a more practical standpoint, Plaintiffs' proposed result would open a gaping hole in the public fisc. It would permit, by analogy, any seeker of state funds to look for accounts receivable of the State and then attempt to garnish them before their purely ministerial transmission to the treasury. Such a mechanism should not be engrafted onto our system of dual sovereignty."

__ F. Supp. 2d __, 2001 WL 8406 n.6.

for money damages." *Barton v. Summers*, 111 F. Supp. 2d at 1101. "[T]o enjoin State officials would be tantamount to telling the State how to disburse funds that it has been granted through the Master Settlement Agreement." *Cardenas v. Anzai*, 2001 WL 58857 at *5. The precedent of this circuit supports the conclusion that the Eleventh Amendment bars precisely this kind of suit. *See V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415, 1422 (10th Cir. 1997) (Eleventh Amendment bars claims for "retroactive monetary reimbursement for licensure and certification fees" and for declaratory judgment that state officials had violated federal law in the past); *Johns v. Stewart*, 57 F.3d 1544, 1553 (10th Cir. 1995) ("A suit for retroactive monetary reimbursement of withheld assistance benefits brought against a state official in his official capacity is a suit against the state because the funds to satisfy the award 'must inevitably come from the general revenues' of the state." (quoting *Edelman v. Jordan*, 415 U.S. 651, 665 (1974))). The plaintiffs seek relief that retroactively divests some portion of the state's entitlement, right or title to settlement proceeds under the M.S.A. Even if characterized as equitable in nature, such relief has more than an ancillary effect on the state treasury and "is the practical equivalent of money damages." *ANR Pipeline v. Lafaver*, 150 F.3d 1178, 1189 (10th Cir. 1998), *cert. denied*, 525 U.S. 1122 (1999); *see Harris v. Owens*, No. 99-S-953, slip op. at 9 (D.Colo. July 19, 2000). In sum, the court finds that the plaintiffs' claims satisfy neither prong of the *Ex parte Young* exception. The court grants the state defendants' motion to dismiss on Eleventh Amendment immunity grounds.

Appendix B

DEFENDANT CITIBANK'S MOTION TO DISMISS

Sued exclusively in its capacity as escrow agent acting under color of state law, Citibank is not alleged to have committed any individual conduct outside of its role as escrow agent to the state. Thus, Citibank may avail itself of the same defenses and immunities protecting the principals. *Strawser*, 2000 WL 8406, at n.6. The plaintiffs do not dispute that a finding of Eleventh Amendment immunity for the state defendants would extend also to Citibank. The court grants Citibank's motion to dismiss on the same Eleventh Amendment immunity grounds.

IT IS THEREFORE ORDERED that the plaintiffs' motion for oral argument (Dk. 45) is denied;

IT IS FURTHER ORDERED that the motion to dismiss (Dk. 25) filed by the defendants Kansas Attorney General Carla Stovall ("Attorney General") and Secretary of Kansas Department of Social and Rehabilitation Services Janet Schalansky ("S.R.S. Secretary") is granted;

IT IS FURTHER ORDERED that the motion to dismiss (Dk. 42) filed by the defendant Citibank, N.A. is granted.

Dated this 2nd day of March, 2001, Topeka, Kansas

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISION

UNITED STATES CONSTITUTION AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Appendix C

42 U.S.C. § 1396k

§ 1396k. — Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this subchapter, a State plan for medical assistance shall —

> (1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required —
>
> > (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this subchapter and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1396a(l)(1)(A) of this title or the individual is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 654(3) of this title) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

Appendix C

42 U.S.C. § 1396b(d)

§ 1396b. Payments to States

(d) Estimates of State entitlement; installments; adjustments to reflect overpayments of underpayments; time for recovery or adjustment; uncollectable or discharged debts; obligated appropriations; disputed claims

(1) Prior to the beginning of each quarter, the Secretary shall estimate the amount to which a State will be entitled under subsections (a) and (b) of this section for such quarter, such estimates to be based on (A) a report filed by the State containing its estimate of the total sum to be expended in such quarter in accordance with the provisions of such subsections, and stating the amount appropriated or made available by the State and its political subdivisions for such expenditures in such quarter, and if such amount is less than the State's proportionate share of the total sum of such estimated expenditures, the source or sources from which the difference is expected to be derived, and (B) such other investigation as the Secretary may find necessary.

(2)(A) The Secretary shall then pay to the State, in such installments as he may determine, the amount so estimated, reduced or increased to the extent of any overpayment or underpayment which the Secretary

determines was made under this section to such State for any prior quarter and with respect to which adjustment has not already been made under this subsection.

(B) Expenditures for which payments were made to the State under subsection (a) of this section shall be treated as an overpayment to the extent that the State or local agency administering such plan has been reimbursed for such expenditures by a third party pursuant to the provisions of its plan in compliance with section 1396a(a)(25) of this title.

(C) For purposes of this subsection, when an overpayment is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment before adjustment is made in the Federal payment to such State on account of such overpayment. Except as otherwise provided in subparagraph (D), the adjustment in the Federal payment shall be made at the end of the 60 days, whether or not recovery was made.

Appendix C

(D) In any case where the State is unable to recover a debt which represents an overpayment (or any portion thereof) made to a person or other entity on account of such debt having been discharged in bankruptcy or otherwise being uncollectable, no adjustment shall be made in the Federal payment to such State on account of such overpayment (or portion thereof).

(3)(A) The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment to be adjusted under this subsection.

(B)(i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986, and State Attorneys General, or as part

of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.

(ii) Except as provided in subsection (i)(19) of this section, a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

(4) Upon the making of any estimate by the Secretary under this subsection, any appropriations available for payments under this section shall be deemed obligated.

(5) In any case in which the Secretary estimates that there has been an overpayment under this section to a State on the basis of a claim by such State that has been disallowed by the Secretary under section 1316(d) of this title, and such State disputes such disallowance, the amount of the Federal payment in controversy shall, at the option of the State, be retained by such State or recovered by the Secretary pending a final determination with respect to such payment amount. If such final determination is to the effect that any amount was properly disallowed, and the State chose to retain payment of the amount in controversy, the Secretary shall offset, from any

subsequent payments made to such State under this subchapter, an amount equal to the proper amount of the disallowance plus interest on such amount disallowed for the period beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period.

(6)(A) Each State (as defined in subsection (w)(7)(D) of this section) shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to —

> (i) provider-related donations made to the State or units of local government during such fiscal year, and
>
> (ii) health care related taxes collected by the State or such units during such fiscal year.

(B) Each State shall include, in the first report submitted under paragraph (1) after the end of each fiscal year, information related to the total amount of payment adjustments made, and the amount of payment adjustments made to individual providers (by provider), under section 1396r-4(c) of this title during such fiscal year.

Appendix C

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix C

42 C.F.R. § 433.154

Title 42 — Public Health
Chapter IV — Centers for Medicare & Medicaid Services, Department of Health and Human Services

Part 433 — State Fiscal Administration
Subpart D — Third Party Liability

Sec. 433.154. Distribution of collections.

The agency must distribute collections as follows —

(a) To itself, an amount equal to State Medicaid expenditures for the individual on whose right the collection was based.

(b) To the Federal Government, the Federal share of the State Medicaid expenditures, minus any incentive payment made in accordance with Sec. 433.153.

(c) To the recipient, any remaining amount. This amount must be treated as income or resources under part 435 or part 436 of this subchapter, as appropriate.

APPENDIX D — COMPLAINT

Case No. 00-4054-SAC

JUDITH CLARK, JOHN C. PULEO, TAMMY THOMAS, ALFRED CLAIRE, MITCHELL DAVISON, OREN HAMILTON, NADINE PERGESON, FELIX H. STROMAN, JR., and All Others Similarly Situated, Their Next of Kin, Heirs, or Personal Representatives,

Plaintiffs,

vs.

ATTORNEY GENERAL CARLA STOVALL; SECRETARY OF KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES, JANET SCHALANSKY, and CITIBANK, N.A.,

Defendants.

AMENDED COMPLAINT-CLASS ACTION

Come now the Plaintiffs on behalf of themselves and all others similarly situated and for their cause of action against the Defendants, hereby allege and state as follows:

I. NATURE OF THE CASE

1. This action is brought by and on behalf of the state's most powerless citizens, poor people who have suffered death, disease and debilitation from tobacco use and who are dependent upon the state's Medicaid program to help pay for their medical care.

2. The Sate of Kansas receives hundreds of millions of dollars in federal funds by virtue of its participation in the Medicaid program and its concomitant agreement to comply with The Medicaid Act and attendant federal regulations.

3. Specifically, the state must comply with those provisions of The Medicaid Act mandating:

a. The recovery of medical assistance payments from third parties who are responsible for causing Medicaid recipients' sickness, injury and death, and

b. The disbursement of a portion of funds collected from those responsible third parties to injured Medicaid recipients, such as the Plaintiffs and others similarly situated.

4. This case arises following the state's successful lawsuit against the manufacturers of tobacco products, *The State of Kansas v. R.J. Reynolds Tobacco Company, et al*, Case No. 96CV-919, filed by the state in the District Court of Shawnee County, Kansas on August 20, 1996. In the course of that litigation, in numerous pleadings filed with the court and in countless public pronouncements, state officials, including Defendant Attorney General Carla Stovall, identified the tobacco company defendants as third parties legally liable for causing Medicaid recipients' sickness, injury and death.

5. Once the state identified the tobacco companies as responsible third parties within the meaning of The Medicaid Act, federal law compelled the state to seek from those companies reimbursement of all monies paid through the state Medicaid program on behalf of persons injured by tobacco use. In Count IV of its Petition against the tobacco companies, for example, the state alleged:

> "As a direct and proximate result of the breaches of duty and omissions of the defendants as alleged above, the state was obligated to pay and has paid millions of dollars in the past for the provision of necessary medical care, facilities and services for certain of those afore-mentioned Kansas residents and citizens injured by the defendants' cigarettes and unable to afford and otherwise obtain such necessary medical care, facilities and services.
>
> The state was legally obligated to pay the afore-mentioned sums and did not conduct itself in any wrongful manner in being so obligated to pay and in paying the afore-mentioned sums.
>
> In all fairness and justice and to prevent an unjust enrichment, the defendants should indemnify the state for the provision of necessary medical care, facilities and services for those afore-mentioned Kansas residents and citizens injured by the defendants' cigarettes."

6. Moreover, the state's petition against the tobacco companies alleged:

> "The state seeks restitution for smoking-related health care costs paid by the state through its various statutory medical programs, including the programs established pursuant to K.S.A. 39-701, *et seq.* For example, under the Kansas Medicaid program, K.S.A. 39-708c and K.S.A. 39-709, the state, in financial partnership with the federal government, provides financial assistance for a broad range of health care services to eligible low income Kansas residents. A significant portion of the monies that the state has paid out, and will continue to pay out, to recipients under the Kansas Medicaid program is for health care costs attributable to smoking-related illnesses and diseases. Additionally, the state expends large sums of money for the provision of health care to eligible citizens under various other state programs, which health care costs are attributable to smoking-related illnesses and diseases."

Further, the State of Kansas explicitly sought to recover monetary damages for "health care expenditures, caused by defendants' actions in violation of the laws of the State of Kansas."

7. In addition to its Petition, other court documents, and official statements made by state officials, including Defendant Attorney General Carla Stovall, in the course of the state's lawsuit against the tobacco companies, reveal that

the central element of damages claimed by the state was the cost of medical payments made through the state's Medicaid program to pay for smoking-related injuries caused by the tobacco companies.

8. On or about November 23, 1998, the State of Kansas settled the lawsuit with the tobacco companies pursuant to a Master Settlement Agreement, whereby the state agreed to dismiss the suit and forever release and discharge the tobacco defendants in exchange for cash payments in an amount in excess of $1.767 billion, the bulk of which is to be paid to the state in annual payments over the next 25 years. The Court issued a Consent Decree and Final Judgment on or about December 3, 1998, whereby the Court approved the Master Settlement Agreement, and the state received its first payment of $20,583,592.26 on December 14, 1999 pursuant to the Agreement.

9. Notwithstanding the fact that the state's lawsuit against the tobacco companies explicitly sought to recover monies paid through the state's Medicaid program, the state officials have claimed that the lawsuit was not a Medicaid recovery action as compelled by The Medicaid Act, and that the state is therefore not required to disburse the settlement proceeds according to the requirements of federal law. The state has taken no steps to disburse to the plaintiffs any portion of the settlement amount or to inform the plaintiffs of their rights to claim that portion of the settlement monies to which they are legally entitled.

10. If, as the state claims, its suit against the tobacco companies was not a Medicaid recovery action, then, even in the face of its own repeated acknowledgment that the tobacco companies are third parties responsible for Medicaid recipients injuries and death, the Defendants have violated federal law by failing to bring an action for the recovery of medical payments from the tobacco companies as compelled by The Medicaid Act and its regulations.

11. If the state's lawsuit against the tobacco companies for the recovery of millions of dollars in medical payments was, as it clearly appears, a recovery action compelled by The Medicaid Act, then the state has violated federal law by refusing to comply with those provisions of The Medicaid Act that compel the state to disburse a portion of the settlement monies directly to the plaintiffs. Whether the Defendants are violating The Medicaid Act by failing to seek the recovery of medical assistance payments from the tobacco companies or are violating The Medicaid Act by failing to distribute to the Plaintiffs a part of the settlement monies the state has already recovered from those companies, the Defendants have illegally deprived and continue to deprive the Plaintiffs of their rights and their property in violation of federal law and the United States Constitution.

12. Defendants' failure to comply with federal law not only deprives Plaintiffs of rights and property secured by federal law and the Constitution, but further threatens the state's entitlement to federal Medicaid funds, endangers the Plaintiffs' continued receipt of medical assistance benefits, and jeopardizes the health and well being of tens of thousands of Kansas' poorest citizens, including the Plaintiffs and others

similarly situated. This Complaint for declaratory and injunctive relief seeks to compel the state and its officials to comply with their duties under federal law.

II. JURISDICTION AND VENUE

13. This action is brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

14. Venue is based upon 28 U.S.C. § 1391(b)(2). A substantial part of the events or omissions giving rise to the claims herein arose, and a substantial part of the property that is the subject of the action is located, in the District of Kansas.

III. PARTIES

15. Plaintiff Judith Clark is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1993.

16. Plaintiff John Puleo is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1995.

17. Plaintiff Tammy Thomas is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1993.

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18. Plaintiff Alfred Caire is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1997.

19. Plaintiff Mitchell Davison is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1988.

20. Plaintiff Oren Hamilton is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1985.

21. Plaintiff Nadine Pergeson is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1988.

22. Plaintiff Felix H. Stroman, Jr. is a citizen and resident of the State of Kansas, who suffers from a smoking-related illness and has been a recipient of medical assistance benefits for that condition through Kansas' Medicaid program since 1985.

23. Defendant Janet Schalansky is the Secretary of the Kansas Social and Rehabilitative Services, and is responsible for establishing policies and practices of the Department,

and for implementing those policies and practices, including policies and practices for the recovery and disbursement of money paid through the Kansas Medicaid program. Defendant Janet Schalansky is sued in her official capacity as the Secretary of the Department of Social and Rehabilitative Services.

24. Defendant Carla Stovall is the Attorney General of the State of Kansas and was responsible for prosecuting and settling the tobacco litigation on behalf of the State of Kansas. Defendant Carla Stovall is sued in her official capacity as the Attorney General of the State of Kansas.

25. Defendant Citibank, N.A. is the Escrow Agent designated by the parties to the tobacco litigation Master Settlement Agreement to receive, manage and disburse the settlement monies to be paid by the tobacco company defendants to the State of Kansas. Citibank, in its capacity as the designated Escrow Agent, is an agent and representative of the State of Kansas, acting under color of state law and may be served with process at Citibank, N.A., 111 Wall Street, New York, New York.

26. At all times relevant to this Complaint, all Defendants were acting under the color of state law.

IV. CLASS ACTION ALLEGATIONS

27. This action is maintainable as a class action under the Federal Rules of Civil Procedure 23, paragraphs (a), (b)(1)(A) and (b)(2).

28. Plaintiffs Judith Clark, John C. Puleo, and Tammy Thomas bring this action on behalf of themselves and all other persons who received medical assistance through the State of Kansas' Medicaid program for tobacco-related diseases or injuries and whose subrogated claims were valid and collectable at the time of and during the underlying tobacco litigation, and the guardians, next-of-kin and personal representatives of such persons.

29. The class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class, specifically, whether Defendants violated federal law by failing to distribute that portion of its settlement proceeds to Plaintiffs over and above that necessary to reimburse the state for its Medicaid expenditures; the claims of the named plaintiffs are typical of the claims of the class; and the named plaintiffs will fairly and adequately represent the interests of the class.

30. The prosecution of separate actions by individual members of the class would create the risk of inconsistent adjudications, which would establish incompatible standards of conduct for Defendants.

31. The Defendants have acted or refused to act on grounds generally applicable to all members of the proposed class, thereby making declaratory and injunctive relief appropriate with respect to the class as a whole.

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V. THE MEDICAID PROGRAM

32. Medicaid is a federal program of medical assistance to eligible low income persons administered by the states under the cooperative federal state funding scheme. Although states are not required to participate in Medicaid, if a state chooses to do so, it must conform to federal Medicaid law.

33. Kansas participates in the Medicaid program. Kansas' program of medical assistance to low income persons is codified at K.S.A. 39-701, *et seq.*

34. In order to participate in the Medicaid program, and as a condition for the receipt of federal funds, Kansas was required to submit to the United States Department of Health and Human Services, the Health Care Financing Administration (HCFA), a comprehensive written statement called "A State Plan" describing the nature and scope of its Medicaid program and giving assurance that the program will be administered in conformity with the requirements of The Medicaid Act and all applicable federal regulations.

35. As a condition of their participation in the program and of the acceptance of federal Medicaid funds, all states, including Kansas, must comply with the requirements imposed by the Medicaid statutes and applicable regulations. As a result, the State of Kansas receives hundreds of millions of dollars in federal funds per year for Medicaid purposes, a portion of which is for tobàcco-related illnesses.

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VI. MEDICAID THIRD-PARTY RECOVERY AND DISBURSEMENT REQUIREMENTS

36. The Medicaid Act, at 42 U.S.C. § 1396a(25)(A) and (B), requires each state in its State Plan to agree (a) "to take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services under the plan," and (b) "in any case where legal liability is found to exist after medical assistance has been made available . . . [to] seek reimbursement for such assistance to the extent of such legal liability."

37. The Act's implementing regulations, at 42 C.F.R. § 433.138(a) provide that the state "must take reasonable measures to determine the legal liability of third parties who are liable to pay for services furnished under the plan."

38. To effectuate recovery from responsible third parties, 42 U.S.C. § 1396a(45) requires that each State Plan must "provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients."

39. In Kansas, Medicaid recipients are deemed to have made an automatic assignment to the state by "applying for or receiving medical assistance under a medical care plan in which federal funds are expended" through The Kansas Medicaid Act, K.S.A. 1999 Supp. 39-709(g).

40. The Medicaid Act and its regulations also set forth specific mandatory rules governing the state's disbursement of amounts recovered from responsible third parties.

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41. Title 42 U.S.C. § 1396k provides that:

> "Such part of any amount collected by the state under an assignment made under the provisions of this section shall be retained by the state as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the federal government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected *shall* be paid to such individual." (emphasis added.)

42. Title 42, C.F.R. § 433.154 similarly mandates that the state *must distribute* to the individual Medicaid recipients all amounts recovered from responsible third parties in excess of what is required to reimburse the state and federal Medicaid programs for medical payments made on behalf of those recipients.

43. As explained by HCFA in its official commentary published in the Federal Register at the time that 433.154 was codified, The Medicaid Act "specifically requires that any overage be paid to the individual, who is usually a person of limited resources." This federally mandated distribution requirement ensures that both the state and federal government are made whole, with the balance of any recovery going to the injured party.

44. Federal regulations, at 42 C.F.R. § 433.151 require that Kansas' State Plan "must provide that the requirements . . . for distributing third party collections specified in 433.154 are met." In its State Plan, the State of Kansas promises HCFA that it meets all requirements of 42 C.F.R. § 433.154.

45. If Kansas fails to comply with the third party recovery provisions of the Medicaid Act, it will lose its entitlement to federal Medicaid funds (42 C.F.R. § 433.140(a)(1)), thereby endangering all Medicaid recipients' continued receipt of medical assistance benefits and jeopardizing the health and well-being of tens of thousands of Kansas' poorest citizens, including the Plaintiff.

VII. THE DEFENDANTS' FAILURE TO COMPLY WITH FEDERAL LAW

46. The Defendants know and for some time have known that manufacturers of tobacco products and certain other tobacco-related organizations are third parties legally liable, within the meaning of the Medicaid Act, for medical assistance payments made through the Kansas Medicaid program.

47. This knowledge led the Defendant Attorney General Stovall to commence a lawsuit on August 20, 1996 against six manufacturers of tobacco products and other tobacco industry defendants, asserting that the defendants' misconduct injured the state by increasing the cost of health care benefits paid by the state through its Medicaid program.

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48. The state's petition alleged, among other things, that:

(a) "The state has paid hundreds of millions of dollars in medical assistance for smoking-related health care costs which would not have occurred absent defendants' misconduct;" (b) "Many of the states' citizens who are afflicted with tobacco-relating diseases are indigents and unable to provide for their own medical care. These citizens rely upon the state to provide their medical care, which reliance results in an extreme burden on the taxpayers and the financial resources of the state;" (c) "The state was obligated to pay and has paid millions of dollars in the past for the provisions of necessary medical care, facilities and services for certain of those afore-mentioned Kansas residents and citizens injured by the defendant's cigarettes and unable to afford and otherwise obtain such necessary medical care, facilities and services.;" (d) "The state was legally obligated to pay the afore-mentioned sums and did not conduct itself in any wrongful manner in being so obligated to pay and in paying the afore-mentioned sums;" (e) "The state of Kansas has undertaken an obligation to pay certain health care costs of its indigent residents;". (f) "Through the conduct alleged herein, the defendants allegedly and in concert, have intentionally and improperly interfered with the state of Kansas' obligation by making its performance of that obligation more expensive and burdensome than it otherwise would have been."

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49. In its petition, the state sought to recover "compensation . . . for past and future damages, including but not limited to health care expenditures, caused by defendants' actions in violation of the laws of the State of Kansas" and for "restitution for the smoking-related health care costs paid by the state through its various statutory medical programs, including the programs established pursuant to K.S.A. 39-701, *et seq.*"

50. The state asserted various counts against the tobacco defendants, but the consistent central element of actual damages was past and future damages for health care expenditures made by the state. Moreover, the Master Settlement Agreement expressly declares that no settlement payments are made "in settlement of an actual or potential liability for a fine, penalty (civil or criminal) for enhanced damages or . . . the cost of a tangible or intangible asset or other future benefit."

51. Moreover, public statements made by Defendant Attorney General Carla Stovall during the course of the tobacco litigation reveal that, although the state asserted various different legal theories in its petition, the purpose of the lawsuit was to recover funds paid through the state Medicaid program.

52. One such example is the Attorney General's statement in a press release dated Tuesday, December 14, 1999, that "Not only were the lawsuits filed to recoup the state's medical expenditures on behalf of smokers, they were filed to stop the tobacco companies from marketing their products to children." Attorney General Stovall also admitted

in a Wednesday, March 10, 1999 press release that the money to which Kansas was entitled under the settlement agreement was "based on the prevalence and cost of tobacco-related illness in our state." Further, an article in the February 18, 2000 *Topeka Capital Journal* states that Kansas' share in the settlement agreement was based on the number of Medicaid recipients on whose behalf the state was seeking damages, and quotes one of the state's attorneys during the tobacco litigation as saying "The way the money was divided among the states was based on a pre-determined formula, it was simply a mathematical computation based on the total damages."

53. Pursuant to the terms of the Master Settlement Agreement and Kansas' release of the tobacco companies, Kansas has forever waived its right to litigate any theories of Medicaid recovery against tobacco companies or to seek from the tobacco companies any reimbursement of Medicaid payments made on behalf of injured smokers, as assignee of the plaintiffs' claims or otherwise.

54. The parties to the Master Settlement Agreement, including the State of Kansas and Attorney General Carla Stovall, took pains to avoid characterizing any portion of the settlement as attributable to Medicaid costs, even though Kansas' petition explicitly sought to recover medical expenditures, and even though distribution of the settlement proceeds under the Master Settlement Agreement mirrors each state's proportionate share of tobacco-related expenditures. It has been admitted by various state governors and by the National Governors Association, for example, that "Our states' attorneys general carefully crafted the tobacco agreement to reflect only state costs."

55. The states were motivated to "carefully craft" the Master Settlement Agreement in this way so that they could attempt to avoid their legal obligations to disburse a portion of the recovery to the federal government, as required by the Medicaid Act.

56. It is a matter of public record, for example, that one of the top priorities of the National Governors Association was to "develop a strategy aimed at preventing the federal government's seizure of state tobacco settlement funds," and that the states, including Kansas, were extremely concerned about "the amount that could be lost because of HCFA recoupment of federal Medicaid expenditures."

57. In May, 1999, as a result of the states' lobbying efforts to avoid paying any of the tobacco settlement monies to HCFA, Congress amended the Medicaid Act, 42 U.S.C. § 1396b(d) to add language waiving the federal government's entitlement to its portion of the settlement proceeds. This legislation was described by the National Governors Association as the governors' "number one legislative priority."

58. The amendment to § 1396b(d), however, does not alter the state's legal obligation to disburse to the Plaintiffs that portion of the settlement monies that exceeds the state's Medicaid costs. Congress did not alter or amend any section of the Medicaid Act affecting the state's disbursement obligation to Medicaid recipients.

59. The $1.767 billion that Kansas is poised to receive from the tobacco companies exceeds even the most generous estimates of what the state has actually paid on behalf of Medicaid recipients in this state who have suffered smoking-related injuries.

60. However, despite the State of Kansas' obligation under federal law to disburse to Medicaid recipients that amount of money which exceeds the state's reimbursement from its expenditures for smoking-related illnesses, the State of Kansas has no intention to disburse to Plaintiffs and others similarly situated any of the excess funds it recovered under the tobacco lawsuit settlement.

61. Under controlling federal law, the settlement proceeds over and above the amount necessary to reimburse the state for its actual medical expenses belongs to the Plaintiffs and others similarly situated, and it must be disbursed to them.

VIII. FIRST CLAIM FOR RELIEF
(Declaratory Judgment, 28 U.S.C. § 2201)

62. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraph 1 through 61.

63. There is an actual controversy between the parties. Plaintiffs contend that the Defendants have failed to comply with the third party recovery provisions of the Medicaid Act and regulations, including those provisions that govern the disbursement of recovered funds to the Plaintiffs. Defendants contend that they have complied with federal law.

64. Plaintiffs, and all members of the Plaintiff Class, have suffered, continue to suffer and are threatened with suffering irreparable injury.

65. Plaintiffs, and all members of the Plaintiff Class, have no adequate remedy at law to redress the violations of the law alleged herein.

66. The Plaintiffs are entitled to a declaration of their rights and the Defendants' obligations with respect to the integrity of Kansas' Medicaid program insofar as the Defendants' failure to comply with federal laws imperils continued receipt of federal funds and endangers the public assistance program upon which Plaintiffs rely to maintain their health and well-being.

67. The Plaintiffs are also entitled to a declaration of their rights and the Defendants' obligations with respect to the provision of the Medicaid Act governing the recovery of medical assistance payments from responsible third parties, such as the tobacco companies, and the proper disbursement of amounts recovered.

IX. SECOND CLAIM FOR RELIEF
(Deprivation of Property Without Due Process)

68. Plaintiffs reallege and incorporate herein by reference each and every allegations of Paragraphs 1 through 67.

69. The Defendants have deprived Plaintiffs of their property without notice, hearing, and other due process required by the Fourteenth Amendment to the United States Constitution.

70. Among other things, the Defendants have deprived Plaintiffs of (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the Plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the Plaintiffs to the state as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

X. THIRD CLAIM FOR RELIEF
(Taking of Property Without Just Compensation)

71. Plaintiffs reallege and incorporate herein by reference each and every allegations of Paragraphs 1 through 70.

72. Defendants have taken Plaintiffs' property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

73. Among other things, the Defendants have deprived Plaintiff of (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and Federal Regulations; (b) that Plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and Federal Regulations; and (c) the value of the rights assigned by the Plaintiffs to

the state as a condition of Medicaid eligibility, which value includes but is not limited to all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments.

74. The Defendants' decision to take Plaintiffs' property expressed in, among other things, the tobacco litigation Master Settlement Agreement and public statements made by Kansas state officials, including Attorney General Carla Stovall, is a final decision.

75. The Master Settlement Agreement, having become final, and the state's tobacco lawsuit having been dismissed with prejudice, no available state procedures or adequate state process exists for the Plaintiffs to seek just compensation.

XI. FOURTH CLAIM FOR RELIEF
(Violation of the Medicaid Disbursement Requirements, 42 U.S.C. § 1983 and 42 U.S.C. § 1396, 1396a and 1396k)

76. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1 through 75.

77. Defendants, acting under color of state law, are violating, have violated and will continue to violate federal law by failing to disburse properly funds that the state has recovered, and will recover, from legally responsible tobacco companies, as compelled by the Medicaid Act and governing federal regulations. By doing so, Defendants are depriving, have deprived and will continue to deprive Plaintiffs of rights secured by the laws of the United States under 42 U.S.C. §§ 1396, 1396a and 1396k, and their implementing regulations.

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XII. FIFTH CLAIM FOR RELIEF
(Violation of the Medicaid Act Recovery Requirements, 42 U.S.C. § 1983 and 42 U.S.C. §§ 1396, 1396a and 1396k)

78. Plaintiffs reallege and incorporate herein by reference each and every allegation of Paragraphs 1 through 77.

79. To the extent Defendants may claim that Kansas' lawsuit against the tobacco companies was not a Medicaid recovery action as compelled by the Medicaid Act, the Defendants have violated and are violating federal law by failing to seek reimbursement of medical assistance payments made through the State Medicaid program from known legally responsible tobacco companies, pursuant to the requirements of the Medicaid Act and governing federal regulations. By doing so, Defendants are depriving and will continue to deprive Plaintiffs of rights secured by laws of the United States under 42 U.S.C. §§ 1396, 1396a and 1396k, and their implementing regulations.

XIII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

80. For an order certifying the class;

81. For an order declaring that the Defendants are compelled by the Medicaid Act and federal regulations: (a) to seek reimbursement of the medical assistance payments made through the state Medicaid program from known legally liable third parties such as those tobacco companies already

identified by the state; and (b) to disburse all amounts recovered in such third party reimbursement actions according to the requirements of the Medicaid Act;

82. For temporary, preliminary and permanent injunctions enjoining and requiring the Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them to disburse to the Plaintiffs, or to cause disbursement to the Plaintiffs of that portion of the tobacco litigation settlement proceeds that belongs to the Plaintiffs, before such proceeds are deposited in the State Treasury or are otherwise in the possession, custody or control of the state;

83. For temporary, preliminary and permanent injunctions enjoining and requiring the Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to return to the Plaintiffs any and all property taken from them, including but not limited to: (a) that portion of the tobacco litigation settlement that rightly belongs to the Plaintiffs by virtue of the requirements of the Medicaid Act and federal regulations; (b) the Plaintiffs' property interest in their claims or causes of action for payment of that portion of the tobacco litigation settlement that rightly belongs to them by virtue of the requirements of the Medicaid Act and federal regulations; and (c) the value of the rights assigned by the Plaintiffs to the state as a condition of Medicaid eligibility, to the full value of all amounts recovered by the state in excess of its tobacco-related Medicaid expenditures by virtue of such assignments, or to provide just compensation to the Plaintiffs of the full value of the property taken.

84. For temporary, preliminary and permanent injunctions enjoining and requiring the Defendants, their successors, agents, employees, assigns and all persons working in concert or participation with them, to provide to each and every member of the Plaintiff Class due process of law concerning any and all property previously taken from the Plaintiffs, including but not limited to: (a) notice; (b) information and documents sufficient to apprise each Plaintiff of the total amount expended by the state Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on that individuals' behalf; and (c) a pre-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation, to seek return of the property previously taken, and to seek just compensation or other redress;

85. For temporary, preliminary and permanent injunctions enjoining and requiring the Defendants, their successors, agents, assigns, employees and all persons working in concert or participation with them to provide to each and every member of the Plaintiff Class due process of law concerning any and all property to be taken from the Plaintiffs in the future, including: (a) notice; (b) information and documents sufficient to apprise each member of the Plaintiff Class of the total amount expended by the state Medicaid program on the individual's behalf and the proportionate amount of the tobacco settlement attributable to the Medicaid costs paid by the state on the individual's behalf; and (c) a post-deprivation hearing at which the individual shall be afforded the opportunity to object to the deprivation and to seek just compensation or other redress;

86. For temporary, preliminary and permanent injunctions enjoining and requiring Defendants, their successors, agents, assigns, employees and persons working in concert or participation with them to take all steps necessary to maintain all monies previously collected and all monies to be collected as a result of its settlement with tobacco companies, so that those settlement monies are not deposited in the State Treasury and will be available for proper accounting and disbursement according to the requirements of the Medicaid Act, other federal laws, the Constitution of the United States, and any and all orders of this Court;

87. For temporary, preliminary and permanent injunctions enjoining and requiring Defendants, their successors, agents, assigns, employees and all persons working in concert or participation with them to take all steps necessary to retain all amounts collected by the state as a result of its settlement with the tobacco companies, and to notify each and every member of the Plaintiff Class of the state law procedures whereby the Plaintiffs may obtain their federally mandated portion of the amounts recovered;

88. For temporary, preliminary and permanent injunctions enjoining and requiring Defendants, their successors, agents, assigns, employees and all persons working in concert or participation with them, to seek reimbursement of medical assistance payments made through the state Medicaid program from tobacco companies and other known legally liable third parties according to the requirements of the Medicaid Act;

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89. For costs and reasonable attorney's fees pursuant to 42 U.S.C. § 1988; and

90. For such other and further relief as the Court deems just and proper and that may benefit the members of this deserving class.

FISHER, CAVANAUGH, SMITH & LEMON, P.A.

By _____

Stephen W. Cavanaugh – KS-10691; MO-42115
Thomas G. Lemon – KS-16120
Harold A. Houck – KS-17694; MO-48420
Todd D. Powell – KS-18723; MO-51315
2942A S.W. Wanamaker Drive, Suite 100
Topeka, Kansas 66614-4135
TEL: 785/440-4000
FAX: 785/440-3900

and

Richard A. Bieder, Federal Bar #CT04208
Antonio Ponvert III, Federal Bar #CT17516
KOSKOFF, KOSKOFF & BIEDER, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
TEL: 203/336-4421
FAX: 203/368-3244

and

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Mike Hodges, KS - 09861
13420 Santa Fe Trail Dr.
Lenexa, KS 66215
TEL: 913-888-7100
FAX: 913-888-7388

CO-ATTORNEYS FOR PLAINTIFFS